IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

NO. 82 5159

ALEXANDER ALDOUPOLIS,
Petitioner

v.

COMMONWEALTH OF MASSACHUSETTS,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME JUDICIAL COURT OF MASSACHUSETTS

Stephen Hrones
190 High Street
Boston, MA 02110

(617) 451-5151

Counsel for Petitioner

TABLE OF CONTENTS

July 1, 1982.

K. Order of Justice Willaim J. Brennan, Jr., July 6, 1982.

L. Sample of Media Coverage.

TABLE OF AUTHORITIES PAGE

CASES

CONSTITUTIONAL PROVISIONS

STATUTES

RULES

OTHER AUTHORITIES

The Petitioner, Alexander Aldoupolis, prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Judicial Court of Massachusetts rendered in this proceeding on May 13, 1982.

QUESTION PRESENTED FOR REVIEW

Is it a violation of Petitioner's Fifth and Fourteenth Amendment Right not to be placed in double jeopardy to be resentenced or retried when Petitioner has already pleaded guilty and commenced serving a legally imposed sentence with every expectation that it was a final disposition?

OPINIONS BELOW

The decision of the Supreme Judicial Court of Massachusetts is reported at 386 Mass. 260 (1982). (See Appendix A).

JURISDICTIONAL STATEMENT

The judgment and opinion of the Supreme Judicial Court sought to be reviewed was issued on May 13, 1982. On May 25, 1982 Petitioner requested a rehearing. The Court denied the Petition for a Rehearing on June 3, 1982. This Court's jurisdiction is invoked under the provisions of 28 U.S.C. §1257 (3).

CONSTITUTIONAL PROVISIONS AND RULES INVOLVED

The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital or other infamous crime unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service, in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

The Fourteenth Amendment to the United States Constitution provides in part:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

Rule 29 of the Massachusetts Rules of Criminal Procedure provides in part:

> (a) Revision or Revocation. The trial judge upon his own motion or the written motion of a defendant filed within sixty days after the imposition of a sentence, within sixty days after receipt by the trial court of a rescript issued upon affirmance of the judgment or dismissal of the appeal, or within sixty days after entry of any order or judgment of an appellate court denying review of, or having the effect of upholding, a judgment of conviction, may, upon such terms and conditions as he shall order revise or revoke such sentence if it appears that justice may not have been done.

STATEMENT OF THE CASE

On October 5, 1981, in Norfolk Superior Court, Alexander Aldoupolis, (hereinafter, "Petitioner"), along with co-defendants Richard Dovel, Mark Savoy, John Strickland, and Robert J. Tarr pleaded guilty to charges of rape, unnatural rape and malicious destruction of property. Abrams, J. accepted their guilty pleas and sentenced them to suspended sentences of from three to five years at the Massachusetts Correctional Institution Walpole; two years probation; and imposed court costs of $500, to be paid at the rate of $5 per week. Petitioner Aldoupolis began serving his sentence by signing a probation contract, commencing his probation and beginning payment of the imposed court costs prior to October 9, 1981. He has continued to pay the court costs

up to the present time.

On October 8, 1981, counsel for each defendant was notified to appear in court the following day, but were given no reason for such required presence. On October 9, 1981, Abrams, J. claiming to be acting pursuant to Mass. R. Crim. P. 29, (see Appendix B) revoked the suspension of the sentences and ordered each defendant to stand committed at MCI, Walpole, if they did not elect to withdraw their guilty pleas by October 13, 1981. In revoking the suspension of the sentences the judge 1) noted the "public interest in the sentences" previously imposed, 2) questioned the legality of the suspended sentences and, 3) referred to statements of the District Attorney apparently made to the media after the public clamor* objecting to the suspended sentences. The judge left the bench without allowing counsel for the defendants an opportunity to be heard. Petitioner obtained a stay of the Superior Court proceeding on October 9, 1981 from a single justice of the Supreme Judicial Court.

On May 13, 1982, the Supreme Judicial Court, in Aldoupolis v. Commonwealth, 386 Mass. 260 (1982), held, 1) that the original suspended sentences were legally imposed; 2) that a trial judge does have the power to revise and revoke sentences on his own power so as to increase their severity, and that such resentencing does not violate the constitutional prohibition against double jeopardy; and, 3) that the defendants did not receive proper notice and an opportunity to be heard on the issue of a revision and revocation of their sentences, thus rendering the trial judge's resentencing invalid.

---

* It should be noted that the suspended sentences imposed on October 5, 1981 received much media attention and criticism. The Governor of Massachusetts injected himself into the controversy and criticized the judge whom he had appointed. See Appendix L for sample of media coverage.

The Court ruled that the judge had the power to vacate the original sentences and impose new ones and directed the Superior Court to resentence the defendants even though it had declared the original suspended sentences valid. On May 25, 1982, the defendants petitioned the Supreme Judicial Court for a rehearing, (see Appendix C) requesting reconsideration of their double jeopardy claim. The Court denied the Petition for Rehearing on June 3, 1982. (See Appendix D). On June 25, 1982 a Superior Court judge acting pursuant to the order of the Supreme Judicial Court to resentence, ordered the Petitioner to appear for resentencing at 10 A.M. on July 1, 1982.

On Monday, June 28, 1982, Petitioner filed a complaint under 42 U.S.C. §1983 in United States District Court requesting that the resentencing on July 1 be enjoined. On Tuesday, June 29, 1982, Petitioner requested that the Supreme Judicial Court of Massachusetts stay the resentencing so as to allow the filing of a Petition to this Court for a writ of certiorari. (See Appendix E). Later in the day on June 29 such request was denied. (See Appendix F).

On June 30, 1982, Federal District Court Judge Robert Keeton denied Petitioner's request for injunctive relief under 42 U.S.C. §1983. (See Appendix G). Later that same day the United States Court of Appeals for the First Circuit affirmed the denial of injunctive relief. (See Appendix H).

Late in the afternoon on June 30, 1982, Petitioner requested a stay of the resentencing from the Honorable William J. Brennan, Jr., Associate Justice of this Court and Circuit Justice for the First Circuit. On the morning of July 1, 1982, resentencing proceedings began in the Superior Court of Massachusetts for Norfolk County, before Donahue, J. Judge Donahue stated that he interpreted the order of the Supreme Judicial Court to allow him to resentence Petitioner Aldoupolis up to the maximum punishment permitted by law, in this case life imprisonment. (See Transcript of Proceedings, 15, Appendix I) Counsel for Petitioner objected to resentencing as a violation of

Petitioner's right not to be placed in double jeopardy. (Transcript, 14, Appendix I). Petitioner then filed a Motion to Withdraw Guilty Plea. Petitioner made it absolutely clear that the only reason he filed the Motion to Withdraw Guilty Plea was in order to preserve his double jeopardy rights. (Transcript, 14, Appendix I). The Motion was denied by Judge Donahue. Before the resentencing proceedings of July 1, 1982 could be completed, Justice William J. Brennan, Jr., entered an order staying the resentencing proceeding pending the receipt of a response from the attorney general and a further order. (See Appendix J). On July 6, 1982, Justice Brennan vacated the order of July 1, 1982 and Petitioner's Application was denied without prejudice to reapplication after final disposition of the proceedings before the Superior Court of Massachusetts for Norfolk County. (See Appendix K).

On July 15, 1982, resentencing proceedings resumed in the Superior Court of Massachusetts for Norfolk County. Judge Donahue reconsidered and granted Petitioner's Motion to Withdraw Guilty Plea of July 1, 1982, without Petitioner having filed a new Motion. Again, counsel for Petitioner made it clear that the Motion had been submitted only as the last possible means of protecting Petitioner's constitutional right not to be placed in double jeopardy. (See Affidavit of counsel). Judge Donahue ordered Petitioner to stand trial on December 2, 1982.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

I. THE DECISION BELOW RAISES SERIOUS AND RECURRING QUESTIONS AS TO THE INTERPRETATION OF THIS COURT'S HOLDING IN UNITED STATES V. DIFRANCESCO.

A. Since Petitioner in the case at bar commenced service of a legally imposed sentence with every expectation that it was a final disposition, this Court's holding in United States v. DiFrancesco is not controlling.

In ordering Petitioner Aldoppolis to be resentenced, the Supreme Judicial Court relied on this Court's holding in United States v. DiFrancesco, 449 U.S. 117 (1980) as dispositive

of Petitioner's double jeopardy claim. See Aldoupolis v. Commonwealth, 386 Mass. 260, 274 (1982). However, the case at bar can be easily distinguished from DiFrancesco. In DiFrancesco, the Supreme Court considered a Congressional Statute* which specifically authorized the government to appeal the sentence of a "dangerous special offender" and which put the defendant on notice that his sentence was not final until the appeal was completed. The Supreme Court held that this right of appeal under "The Organized Crime Control Act of 1970," 18 U.S.C. §3576, did not violate the double jeopardy clause:

> Under §3576 the [prosecution's] appeal is to be taken promptly and is essentially on the record of the sentencing court. The defendant, of course, is charged with knowledge of the statute and its appeal, and has no expectation of finality in his sentence until the appeal is concluded or the time to appeal has expired.

DiFrancesco, supra, at 136 (emphasis added).

The holding of the Supreme Judicial Court that the "defendants should not have had an expectation of finality in their sentences" in the face of Rule 29 of the Massachusetts Rules of Criminal Procedure (Aldoupolis, supra, 274) is not supported by the history and use of Rule 29. Rule 29 authorizes the "judge upon his own motion or the written motion of a defendant filed within sixty days...[to] revise or revoke such sentence if it appears that justice may not have been done." Historically, Rule 29 and its predecessors have always been understood to govern the reduction, not the increase of a sentence. The Reporters' Notes to the Rules state "The rule governs reductions of sentences motivated by demands of fairness." Mass. Ann. Laws, Criminal Procedure 474 (Lawyers Co-op 1979) (emphasis added) cf. District Attorney for the Northern District v. Superior Court, 342 Mass.

---

* 18 U.S.C. §3576: "With respect to the imposition, correction, or reduction of a sentence after proceedings under section 3575 of this chapter, [dangerous special offender], a review of the sentence on the record of the sentencing court may be taken by the defendant or the United States to a Court of Appeals" DiFrancesco, supra, at 120 N.2.

119, 127-128 (1961). The Reporters' Notes state also (at 475) the rule "[t]hat an increase in the sentence once execution has commenced is not permitted."* In fact, at the time of the sentencing Rule 29 had never been used to authorize the increase of a sentence once the defendant had begun serving it.

Rule 29, therefore, failed to give Petitoner notice that his sentence could be increased and is not analogous to §3576. Furthermore, the review proceeding in DiFrancesco is a direct appeal as of right, based on the record of the trial court. Id. at 120 N.2. However, the "revise and revoke" proceeding under Rule 29 is collateral in nature. It represents an extraordinary process, taken at the discretion of the trial judge.

Where a criminal defendant has an expectation of finality the double jeopardy clause prohibits the very act of twice bring put in jeopardy.

> 'The Constitution of the United States, in the Fifth Amendment, declares, "nor shall any person be subject [for the same offense] to be twice put in jeopardy of life or limb." The prohibition is not against being twice punished but against twice being put in jeopardy...' ...The 'twice put in jeopardy' language this relates to a potential...

Abney v. United States, 431 U.S. 651, 661 (1977) quoting from Price v. Georgia, 398 U.S. 323, 326 (1970). This Court has held that the right not to be placed in double jeopardy involves the danger of irreparable harm and must be protected prospectively. Abney, supra 658. Therefore, double jeopardy claims are immediately reviewable, prior to the completion of criminal proceedings. Abney is not limited to federal cases but applies equally to state

---

* This Court in DiFrancesco, supra, 139 did not overrule the long-established principle against increased sentences but rather refused to apply it where the defendant had no legitimate expectation of finality. Other exceptions allow an increased sentence where the original sentence imposed was invalid, Bozza v. United States, 330 U.S. 160, 166 (1947) or where the defendant obtains a new trial, North Carolina v. Pearce, 395 U.S. 711, 719-721 (1969). None of these exceptions are applicable to the case at bar.

court proceedings. See Bullington v. Missouri, 451 U.S. 430, 437 N.8 (1981). In Bullington this Court applied the protection of the double jeopardy clause to the sentencing process, while further state proceedings were still pending. The underlying value of the double jeopardy clause therefore prohibits the very act of a second trial, regardless of the possible verdict and also prohibits resentencing.

> The general function of the double jeopardy clause is to assure that the prosecution and punishment of an individual have the degrees of finality and fairness essential to administration of the criminal law...; the degree of finality insures that a criminal defendant, having once been convicted and punished or acquitted, not live in a state of anxiety and insecurity for fear of further prosecution or punishment of the same offense.

A Definition of Punishment for Implementing the Double Jeopardy Clause's Multiple Punishment Doctrine, 90 Yale L.J. 632, 634 (1981).

The prohibition against being placed in double jeopardy therefore "represents a policy of finality for the defendants' benefit" in criminal proceedings. United States v. Jorn, 400 U.S. 470, 479 (1971); see also, Crist v. Bretz, 437 U.S. 28, 33 (1978). This expectation of finality attaches as soon as a defendant is placed on probation:

> The general rule is that an increase in sentence after the defendant has commenced serving his punishment, is a violation of defendant's right not to be subject to double jeopardy. While in the present case it may appear that the serving of a few days probation has such a minimal effect on a defendant that there is no injustice done by altering the sentence, we can easily conceive of circumstances in which a court might attempt to increase the defendant's punishment after months or years of probation have been served. A formal rule against any increase in penalty after service of probation has commenced will prevent any such occurrences and insure the defendant the requisite degree of finality in the disposition of his case.

United States v. Bynoe, 562 F.2d 126, 128-129 (1st Cir. 1977). See also Breest v. Helgemoe, 579 F.2d 95,99 (1st Cir. 1978). In the case at bar Petitioner commenced service of a valid, legally imposed sentence. He has since served several months of probation and made weekly payments of court costs as part of his sentence. When Petitioner began serving his sentence, he had no reason to question its finality. Therefore, the holding of DiFrancesco is not applicable to the case at bar and the reliance of the Supreme Judicial Court on DiFrancesco is misplaced.

It is also significant that DiFrancesco was a 5-4 decision, with the four dissenters present members of the Court. Two members of the majority in that case, Justice Rehnquist and Chief Justice Burger, stated in Whalen v. United States, 444 U.S. 684, 703 (1980) (Rehnquist, J. dissenting) handed down just before DiFrancesco, that "Ex parte Lange prevents a sentencing court from increasing a defendant's sentence... even though the second sentence is within the limits set by the legislature." Thus it is not at all clear that a majority of the Court would allow an increase in sentence without the notice of lack of finality present in Difrancesco. It should also be noted that Justice Blackmun, who wrote the majority opinion in DiFrancesco, later wrote the majority opinion in Bullington v. Missouri, 451 U.S. 430 (1981) which affirmed that the double jeopardy clause applies to the sentencing process.

B. The Circuit Courts of Appeal have reached inconsistent results in their interpretation of this Court's holding in DiFrancesco.

Recently the Fifth Circuit recognized that DiFrancesco is not applicable where the defendant is not put on notice of the lack of finality. In Bullard v. Estelle, 665 F.2d 1347, 1361 (5th Cir. 1982) the court stated that,

> [The] cautious approach [in DiFrancesco] in limiting its holding and distinguishing the factual context in which it was appropriate suggested that other sentencing proceedings might implicate the values of the double jeopardy clause.

Bullington provides the gap left by DiFrancesco required for our analysis of this case and mandates application of the double jeopardy clause to the case before us.

The Couft held that DiFrancesco was not controlling and that the petitioner Bullard had a legitimate expectation of finality. See Bullard, supra at 1361, N.30. The Fifth Circuit, therefore, limited DiFrancesco to its factual context and refused to extend it.

The First Circuit has reached a contrary result and has held DiFrancesco to be controlling even where a criminal defendant has every expectation of finality. In Aldoupolis v. Superior Court Dept. of the Trial Court of Massachusetts, No. 82-1533, (1st Cir. June 30, 1982) (see Appendix H), the Court of Appeals adopted the reasons of the district court in rejecting Petitioner Aldoupolis' double jeopardy claim in a 42 U.S.C. §1983 action. The district court recognized that "one might reasonably argue that no state law comparable to the dangerous special offender statute is involved here and that this case is outside the reach of DiFrancesco." Aldoupolis v. Superior Court Dept. of the Trial Court of Massachusetts, 82-1795-K, Memorandum at 3 (D. Mass. June 30, 1982) (see Appendix G). Nevertheless, in ruling against the Petitioner, the court held that the "rationale" of DiFrancesco was dispositive of Aldoupolis' double jeopardy claim. Id. at 3.

The Third Circuit has also interpreted DiFrancesco broadly. In United States v. Busic, 639 F.2d 940 (3rd Cir. 1981) the court applied DiFrancesco in holding that double jeopardy does not bar resentencing following appeal even on counts that were not set aside on appeal. The Second Circuit, however, has expressed uncertainly as to the reach of DiFrancesco. In McClain v. United States, 643 F.2d 911, 913 (2nd Cir. 1981) the court stated that it was unclear what effect DiFrancesco had on

the general rule prohibiting an increased sentence once a defendant has commenced serving a valid sentence.

It should also be noted that there is conflict among the highest state courts in their interpretation of DiFrancesco. In State v. Ryan, 86 N.J.1, 429 A.2d 332, cert. denied, 102 S. Ct. 363 (1981) the New Jersey Supreme Court reached a result directly contrary to that of the Supreme Judicial Court of Massachusetts. In Ryan the Court held, in a strongly worded opinion, that DiFrancesco is not applicable where a criminal defendant has a legitimate expectation of finality. Once a defendant has commenced serving a sentence, expecting it to be final, that sentence may not be increased. Therefore, in Ryan the Court vacated the increased sentence and re-instated the original sentence imposed.

III. PETITIONER HAS NOT WAIVED HIS CONSTITUTIONAL RIGHT NOT TO BE PLACED IN DOUBLE JEOPARDY.

Petitioner's Motion to Withdraw Guilty Plea, filed in the resentencing proceedings of July 1, 1982, was not a waiver of his double jeopardy claim. Petitioner made it absolutely clear that said Motion was submitted only to protect his double jeopardy claim:

> MR. HRONES. So let me put on the record, so it's absolutely clear, that the Defendant Aldoupolis, number one, objects to this resentencing. It is his position that it violates his rights, under the United States Constitution, not to be put in double jeopardy, because the Supreme Judicial Court of this State declared the original sentence he gave on Monday, October Fifth, was a legal one. I want it absolutely clear, any motions filed today are not waiving that point. That the only reason these motions are being filed is because the defendant must file them in order to protect his double jeopardy rights.

Transcript of Proceedings, 14-15, Appendix I.

Petitioner emphasized that the very act of resentencing to any punishment other than the sentence originally imposed would be a violation of his right not to be placed in double jeopardy.

Since the sentencing judge had already stated that he was not bound to impose the original sentence, but could sentence the Petitioner up to the maximum punishment of life imprisonment (Transcript 15, Appendix I) and the stay of resentencing by Justice Brennan had not yet been entered, the Motion to Withdraw Guilty Plea was the only way to protect Petitioner's double jeopardy right and prevent immediate incarceration. Thus, it cannot be said that Petitioner voluntarily waived his double jeopardy claim by withdrawing his guilty plea. On the contrary, he moved to withdraw the plea precisely in order to preserve his constitutional right.

In Green v. United States, 355 U.S. 184, 191-192 (1957) this Court held that a waiver involves the knowing relinquishment of a right and can only take place where the defendant has a meaningful choice. Petitioner in the case at bar had no meaningful choice. He had to either withdraw his plea or be unconstitutionally resentenced. He certainly did not relinguish the very right he intended to protect.*

While Petitioner contends that any act of resentencing violates his double jeopardy rights, the disposition by Judge Donahue in Superior Court that Petitioner stand trial subjects him to the risk of even greater harm. The double jeopardy clause clearly "protects against a second prosecution for the same offense after conviction." North Carolina v. Pearce, 395 U.S. 711, 717 (1969). Petitioner has already been convicted by virtue of his guilty plea, has commenced serving his sentence and has continued to pay the imposed court costs up to the present time. To compel Petitioner to face the "hazards of trial and possible

---

* The "voluntary choice doctrine," which allows retrial where a defendant successfully appeals his conviction, North Carolina v. Pearce, 395 U.S. 711, 719-721 (1969), or succeeds in having his trial terminated prior to a determination of guilt or innocence, United States v. Scott, 437 U.S. 82, 87-92 (1978) is not applicable to the case at bar.

conviction more than once for an alleged offense" is to force him to "run the gauntlet" a second time. Green, supra, 187, 190. Petitioner has certainly "run the gauntlet" a first time. He underwent a guilty plea proceeding and has appeared in court for sentencing on no less than four occasions. He has had to undergo the stigma of massive publicity. His picture has appeared on every television station and in every major newspaper in the Greater Boston area, as well as in national publications. (See Appendix L for sample of media coverage). To compel Petitioner "to live in a continuing state of anxiety and insecurity" by ordering him to submit to trial and face the risk of imprisonment is to place him in jeopardy for the second time. See Green, supra, 187-188.

CONCLUSION

For these reasons a writ of certiorari should issue to review the judgment and opinion of the Supreme Judicial Court of Massachusetts.

Respectfully submitted,

Stephen Hrones
190 High Street
Boston, MA 02110
(617) 451-5151

Counsel for the Petitioner

On the Petition
Frank Pannozzi

APPENDIX A

ALEXANDER ALDOUPOLIS vs. COMMONWEALTH (and four companion cases[1]).

Suffolk. February 2, 1982. — May 13, 1982.

Present: HENNESSEY, C.J., WILKINS, LIACOS, NOLAN, & O'CONNOR, JJ.

Practice, Criminal, Sentence. *Rape. Constitutional Law,* Double jeopardy. *Statute,* Construction. *Rules of Criminal Procedure.*

The language of G. L. c. 279, § 1, prohibiting a judge from imposing a suspended sentence upon a defendant convicted of a crime "punishable by death or imprisonment for life" did not prohibit suspending the execution of sentences of imprisonment imposed upon defendants convicted of rape under a statute prescribing "imprisonment . . . for life or for any term of years." [ ] NOLAN, J., dissenting.

A judge, upon his own motion, had authority under Mass. R. Crim. P. 29 to revoke suspended sentences lawfully imposed upon criminal defendants following their pleas of guilty and to impose more severe sentences, notwithstanding the partial execution of the defendants' original sentences. [ ]

Revocation of suspended sentences lawfully imposed upon criminal defendants after pleas of guilty, and the imposition of new sentences to terms of imprisonment, did not violate the defendants' Federal constitutional guarantee against double jeopardy, where the facts presented no issue of multiple punishment of the defendants [ ], and where, in light of the judge's power to revise sentences during the sixty-day period provided by Mass. R. Crim. P. 29, the defendants could have had no expectation of finality in their original sentences [ ].

A judge who, on his own motion pursuant to Mass. R. Crim. P. 29, seeks to revise or revoke criminal sentence must give the defendant adequate notice of the proceeding and an opportunity to be heard thereat, and should state on the record the reasons why it appears that "justice may not have been done" by the original sentence. [ ]

CIVIL ACTIONS commenced in the Supreme Judicial Court for the county of Suffolk on October 9, 1981, October 13, 1981, October 14, 1981, and October 19, 1981.

[1]The companion cases are by Richard Dovel, Mark Savoy, John Strickland, and Robert J. Tarr against the Commonwealth.

The cases were reported by *Lynch*, J.

Stephen Hrones for Alexander Aldoupolis.

Joseph R. Welch for Robert J. Tarr.

Marie T. Buckley for Richard Dovel.

William H. Pritchard for John Strickland.

P. J. Piscitelli (*J. Russell Hodgdon* with him) for Mark Savoy.

Charles J. Hely, Assistant District Attorney, for the Commonwealth.

Barbara A. H. Smith, Assistant Attorney General, for the Attorney General, intervener.

Anthony M. Traini, for Massachusetts Association of Criminal Defense Lawyers, amicus curiae, submitted a brief.

Liacos, J. A grand jury indicted the defendants on August 5, 1980, for rape, unnatural rape, and malicious destruction of property. On October 5, 1981, each defendant pleaded guilty to the charges.[2] The judge accepted their pleas and sentenced each to a suspended sentence of from three to five years at the Massachusetts Correctional Institution, Walpole, two years' probation, and imposed court costs of $500.[3] Subsequently, the defendants reported to the probation officer, signed probation contracts, and made partial payments of the court costs.

On October 8, 1981, counsel for each defendant was notified to appear in court the following day. Less than twenty-four hours' notice was given of this hearing, and the purpose of the hearing was not disclosed. On October 9, 1981, the judge, acting under the authority of Mass. R. Crim. P. 29, 378 Mass. 899 (1979), revoked the suspension of the defendants' sentences and ordered the defendants to stand committed for the three-to-five-year terms, with the provision that each could withdraw his guilty pleas on or before October 13, 1981, and stand trial in February, 1982.

[2] The defendants were also indicted for assault and battery. Each such indictment was placed on file without a change of plea. The defendant Aldoupolis was indicted for kidnapping, which indictment was dismissed.

[3] See G. L. c. 280, § 6. Court costs were to be paid at the rate of $5 a week over the two-year probationary term.

The judge revoked the suspension of the execution of the sentences (1) noting the "public interest in the sentences" previously imposed; (2) questioning the legality, in light of G. L. c. 279, §§ 1 and 1A, of a suspended sentence for the crime of rape charged under G. L. c. 265, § 22; and (3) "[i]n view of the statements of the District Attorney objecting to my imposing a suspended sentence, as well as a desire to have this case tried on its merits." None of the defendants was afforded an opportunity to argue, respond, or object to the proceedings.[4]

On the same day, the defendant Aldoupolis moved before a single justice of this court to enjoin further proceedings in the Superior Court until the close of business on October 14, 1981.[5] The single justice issued the requested stay, heard oral arguments on October 14, and continued the matter to October 20, 1981. Before that day, all the defendants filed petitions for relief under G. L. c. 211, § 3. The single justice reserved and reported the matter to the full court.[6]

A-2

The defendants raise three issues: (1) whether G. L. c. 279, § 1, prohibits the suspension of the execution of a sentence of imprisonment for an offense punishable by life imprisonment or for any lesser term of years; (2) whether the trial judge was authorized under Mass. R. Crim. P. 29 to convert the suspended sentence to a sentence of imprisonment without violating the double jeopardy clause of the United States Constitution; and (3) whether, if the answer to issue (2) is in the affirmative, the judge can take the action described on less than twenty-four hours' notice to the defendants, without any prior notification of the purpose of

[4]The defendants Aldoupolis and Dovel subsequently filed written motions to record their objections.

[5]Prior to a hearing on this motion the defendants Dovel, Tarr, and Savoy filed motions to intervene. The defendant Strickland filed a petition for relief under G. L. c. 211, § 3. The single justice also allowed the Attorney General to intervene on behalf of the Commonwealth.

[6]In addition to the briefs of the parties, we acknowledge the assistance of an amicus brief filed by the Massachusetts Association of Criminal Defense Lawyers.

the hearing, and without the defendants' having an opportunity to be heard at the hearing.

Because the issues before the court are strictly those of law, a recitation of the facts of the substantive crimes involved is unnecessary. We turn directly to the legal questions raised on this report.

1. *G. L. c. 279, § 1.* General Laws c. 279, § 1, as amended through St. 1975, c. 347, provides in pertinent part: "When a person convicted before a court is sentenced to imprisonment, the court may direct that the execution of the sentence, or any part thereof, be suspended and that he be placed on probation for such time and on such terms and conditions as it shall fix. . . . The provisions of this section shall not permit the suspension of the execution of the sentence of a person convicted of a crime punishable by death or imprisonment for life." At the time the offense was committed, the rape statute provided: "Whoever has sexual intercourse or unnatural sexual intercourse with a person, and compels such person to submit by force and against his will, or compels such person to submit by threat of bodily injury, shall be punished by imprisonment in the state prison for life or for any term of years." G. L. c. 265, § 22, as then amended by St. 1974, c. 474, § 1.

General Laws c. 279, § 1, prohibits the granting of a suspended sentence when a person is convicted of a crime "punishable by death or imprisonment for life." The words "punishable by death or imprisonment for life" may be clear standing alone, but the applicability of G. L. c. 279, § 1, to a variety of statutorily proscribed offenses is not. The parties argue the question whether the prohibition against suspension of a sentence is applicable only to a crime such as murder which is punishable by death or life imprisonment, G. L. c. 265, § 2,[7] or to all crimes that carry the possibility of life imprisonment.[8]

[7] See *District Attorney for the Suffolk Dist.* v. *Watson*, Mass. Adv. Sh. (1980) 2231 (held death penalty unconstitutional).

[8] There are various crimes in this Commonwealth that are punishable by imprisonment for life or for any term of years. See, e.g., G. L. c. 265,

The Commonwealth urges the court not to indulge in statutory interpretation, arguing that the meaning of G. L. c. 279, § 1, is clear. "The decisions of [the United States Supreme Court, however,] have repeatedly warned against the dangers of an approach to statutory construction which confines itself to the bare words of a statute . . . for 'literalness may strangle meaning.' *Utah Junk Co.* v. *Porter*, 328 U.S. 39, 44 [1946]." *Lynch* v. *Overholser*, 369 U.S. 705, 710 (1962). Despite its superficial clarity, we find ambiguity in the application of the phrase "death or imprisonment for life." See *Sanker* v. *United States*, 374 A.2d 304, 307 (D.C. Cir. 1977). Put another way, it becomes necessary to clarify the question whether the proscription of G. L. c. 279, § 1, applies only to those crimes for which the punishment provided is "death or imprisonment for life" or also applies to those crimes for which the punishment is "imprisonment for life or for any term of years." Taken in the context of the statutory scheme of punishment, there is ambiguity in the meaning of G. L. c. 279, § 1.

"The words of a criminal statute must be such as to leave no reasonable doubt as to its meaning or the intention of the legislature . . . ." 3 C. Sands, Sutherland Statutory Construction § 59.04, at 13 (4th ed. 1974). Where the statutory language is unclear, we look to outside sources to determine the meaning of the statute. *Barclay* v. *DeVeau*, Mass. Adv. Sh. (1981) 2307, 2311. *Massachusetts Mut. Life Ins. Co.* v. *Commissioner of Corps. & Taxation*, 363 Mass. 685, 690 (1973). We turn first to the legislative history of the statute for insight into what the Legislature intended by enacting G. L. c. 279, § 1.

A-3

§ 13 (manslaughter during commission of offense under G. L. c. 266, §§ 101-102B); § 13B (indecent assault and battery on a child, second offense); § 17 (armed robbery); § 18A (armed assault in a dwelling house); § 21 (confining or putting in fear a person for purposes of stealing); § 22 (rape); § 24 (assault with intent to commit rape, second offense); § 24B (assault on a child with intent to commit rape); § 26 (kidnapping with intent to extort money); § 28 (poisoning with intent to injure); G. L. c. 266, § 14 (burglary, being armed).

The Legislature amended G. L. c. 279, § 1, in 1925 by adding a new paragraph: "The provisions of this section shall not permit the suspension of the execution of the sentence of a person convicted of operating a motor vehicle while under the influence of intoxicating liquor if such offence was committed within a period of six years immediately following his final conviction of a like offence by a court or magistrate of the commonwealth." St. 1925, c. 297, § 2. The following year the Legislature added to the end of the 1925 amendment: "or of a person convicted of a felony if it shall appear that he has been previously convicted of any felony." St. 1926, c. 271, § 2. In 1934 the Legislature added two more categories of crimes in which suspension of execution of the sentence was forbidden: "a crime punishable by death or imprisonment for life or of a crime an element of which is being armed with a dangerous weapon." St. 1934, c. 250, § 1. An amendment in 1936 eliminated the "operating under the influence" category, St. 1936, c. 434, § 2, and one in 1939 added a new category of election law offenses, St. 1939, c. 299, § 5. The last pertinent amendments appear in 1966 and 1967. The second felony category was deleted and the reference to particular sections of the election law was changed in 1966. St. 1966, c. 292. In 1967, the Legislature deleted the election law offenses and the crimes, "an element of which is being armed with a dangerous weapon." St. 1967, c. 333. Thus, the only category of crime remaining for which the suspension of execution of the sentence was prohibited was a crime punishable by death or life imprisonment.

This pattern of amendments is hardly helpful in evidencing the legislative intent on the issue presented for decision. The various amendments, without more, shed no light on the question whether the Legislature deleted all the other categories of offenses because it sought to prohibit suspension of execution of sentences only in murder cases or whether the Legislature intended the language to cover a broad category of felonies. Another provision of the General Laws, G. L. c. 266, § 14, however, indicates that the

former interpretation is closer to the legislative intent underlying G. L. c. 279, § 1.

General Laws c. 266, § 14, defines the elements of the substantive crime of burglary while being armed and burglary coupled with making an assault. The punishment for the crime is "imprisonment in the state prison for life or for any term of not less than ten years." G. L. c. 266, § 14, as amended. The last sentence of § 14 states that "[t]he sentence imposed upon a person who, after being convicted of any offence mentioned in this section, commits the like offence, or any other of the offences therein mentioned, shall not be suspended, nor shall he be placed on probation." *Id.* The quoted sentence was added to the statute by St. 1966, c. 330. Interestingly, as previously stated in this opinion, G. L. c. 279, § 1, was also amended in 1966 by St. 1966, c. 292. Both amendments were approved in the same month of the legislative session. If the Legislature intended that the "death or life imprisonment" language of G. L. c. 279, § 1, be applicable to a crime punishable by life imprisonment or any terms of years, why did it act to amend the burglary statute shortly after amending G. L. c. 279, § 1? The last sentence of G. L. c. 266, § 14, cannot be mere surplusage. "[T]he Legislature in passing the later act must be taken to have had the provisions of the earlier one in mind, and to have intended both acts to operate as parts of one harmonious whole." *Commonwealth* v. *King*, 202 Mass. 379, 388 (1909).[9] See *Eastern Racing Ass'n* v. *Assessors of Revere*,

[9] See also G. L. c. 279, § 1A, as amended through St. 1978, c. 478, § 309, providing for suspension of execution of sentence and probation, when a person is convicted and sentenced to "fine and imprisonment." The last sentence of G. L. c. 279, § 1A, states: "This section shall not permit the suspension of the execution of the sentence of any person convicted of a crime punishable by imprisonment for life or of a crime an element of which is being armed with a dangerous weapon, or of any person convicted of any other felony if it shall appear that he has been previously convicted of any felony." These defendants had no prior felony convictions. Also, the omission of the words "or of any term of years" and the proscription of suspended sentences for the most serious offenses and repeat felony offenders seems to corroborate our analysis of legislative intent. Cf. G. L. c. 264, § 2 (treason "shall be punished by imprisonment in the state prison for life").

300 Mass. 578, 581 (1938). 2A C. Sands, Sutherland Statutory Construction § 51.02, at 290 (4th ed. 1973).

We conclude also that the prohibition against suspension of execution of sentences found in G. L. c. 279, § 1, is inapplicable to crimes that carry the possibility of life imprisonment or imprisonment for a term of years by strictly construing the statute in favor of the defendant. "[O]rdinary rules of statutory construction require us to construe any criminal statute strictly against the Commonwealth." *Commonwealth* v. *Devlin*, 366 Mass. 132, 137-138 (1974), citing *Commonwealth* v. *Paccia*, 338 Mass. 4, 6 (1958). In light of the inherent ambiguity regarding the ambit of G. L. c. 279, § 1, resolution must be made in favor of the defendants in this case. See *Commonwealth* v. *Crosscup*, 369 Mass. 228, 234 (1975). See also 3 C. Sands, *supra* at § 59.04, at 13. The sentences originally imposed were legally suspended.[10]

[10] The defendants argue on appeal that their suspended sentences were legal on the alternative theory that they ought to benefit from the mitigated penalty provided in the new statute for unaggravated rape. See G. L. c. 265, § 22, as appearing in St. 1980, c. 459, § 6. At the time of the offense, January 23, 1980, former G. L. c. 265, § 22, provided that the punishment for rape was imprisonment for life or any terms of years. At the time of sentencing, October 5, 1981, G. L. c. 265, § 22, had been amended and the offense was divided into two degrees, aggravated and unaggravated rape. The defendants further argue that since the rape indictments alleged no circumstances of aggravation, their pleas of guilty were under G. L. c. 265, § 22 (*b*), unaggravated rape, for which the maximum punishment for a first offender is imprisonment in State prison for not more than twenty years. The defendants contend that the new statute mitigates the punishment for their offense and, as a general rule, the defendants may have the benefit of the mitigating law. See *Commonwealth* v. *Vaughn*, 329 Mass. 333, 338-339 (1952). Hence, they conclude G. L. c. 279, § 1, does not apply. The Commonwealth contends that the new statute is a comprehensive revision of the General Laws pertaining to rape and sexual assault and not merely a change in the punishment for the offense. The Commonwealth further argues that St. 1980, c. 459, § 6, in effect, repealed former G. L. c. 265, § 22, and thus G. L. c. 4, § 6, Second, would be applicable. See G. L. c. 4, § 6, Second (repeal of a statute shall not affect punishment incurred before repeal takes effect). Since we conclude that the sentencing judge acted legally in suspending the defendants' term of imprisonment under the former G. L. c. 265, § 22, we need not reach this issue.

2. *Sentence revision.* Concluding that G. L. c. 279, § 1, does not forbid the imposition of a suspended sentence as punishment for conviction of rape, we turn to the question whether the judge had the power to revise and revoke the defendants' sentences although such sentences were legal. On October 9, 1981, the judge revoked the suspension of the execution of the sentences imposed on October 5, 1981, ordered the defendants to stand committed for terms of from three to five years at the Massachusetts Correctional Institution, Walpole, and, in accordance with Mass. R. Crim. P. 12 (c) (2) (B), 378 Mass. 866 (1979), gave leave to the defendants to withdraw their pleas of guilty. The execution of the State prison sentences was suspended pending appellate review.

The defendants contend that the judge acted illegally in two respects. First, the defendants argue that the judge had no authority under Mass. R. Crim. P. 29 to increase their sentences, once imposed. Secondly, even if a judge could increase a sentence after it was imposed, because the defendants herein had begun to serve their sentences, the judge's action placed them twice in jeopardy. We conclude that the judge had authority under rule 29 to revise the defendants' sentences within sixty days of the imposition of the original sentences, and such action did not violate the defendants' rights against double jeopardy.

a. *Rule 29 of the Massachusetts Rules of Criminal Procedure.* The defendants contend that the trial judge had no authority to act on his own motion pursuant to rule 29 to revise and revoke the defendants' sentences in a way that increased the severity of the sentences. This argument ignores the actual language of rule 29[11] and principally relies on the Reporters' Notes accompanying the Rules.

[11] Rule 29 (a) of the Massachusetts Rules of Criminal Procedure, 378 Mass. 899 (1979), provides: "The trial judge upon his own motion or the written motion of a defendant filed within sixty days after the imposition of a sentence, within sixty days after receipt by the trial court of a rescript issued upon affirmance of the judgment or dismissal of the appeal, or within sixty days after entry of any order or judgment of an appellate

The Reporters' Notes point out that rule 29 is "drawn i part" from Fed. R. Crim. P. 35. Reporters' Notes to Mas. R. Crim. P. 29, Mass. Ann. Laws, Criminal Procedure 474 (Michie/Law. Co-op. 1979). The Reporters state fu ther that the rule "governs *reductions* of sentences motiva ed by demands of fairness," and "[t]hat an increase in t sentence once execution has commenced is not permitt has, however, long been settled" (emphasis supplied). *Id.* at 475. The Reporters' Notes, not officially approved or re viewed by this court, are not binding on this court. Addi tionally, rule 29, unlike Fed. R. Crim. P. 35, is limite neither to correction of illegal sentences nor to reduction o sentences.[12] Lastly, these Notes were prepared prior to th opinion of the Court in *United States* v. *DiFrancesco*, 44 U.S. 117 (1980), which, as we discuss later, has held that sentence may, under certain conditions, be increased with out violating the double jeopardy clause.

Rule 29 states that "[t]he trial judge upon his own motion" may revise and revoke a defendant's sentence within sixt days after imposition of the sentence. Cf. *Commonwealth* v. *Sitko*, 372 Mass. 305, 312 (1977) (under prior practice Commonwealth could move for revocation and revision o defendant's sentence within sixty days of imposition). Thi power is consistent with the general responsibility of a judge to safeguard both the rights of the accused and the interes of the public in the due administration of the law. "The

court denying review of, or having the effect of upholding, a judgment o conviction, may upon such terms and conditions as he shall order, revise or revoke such sentence if it appears that justice may not have been done."

[12] Rule 35(b) of the Federal Rules of Criminal Procedure states: "The court may reduce a sentence within 120 days after the sentence is imposed, or within 120 days after receipt by the court of a mandate issued upon affirmance of the judgment or dismissal of the appeal, or within 120 days after entry of any order or judgment of the Supreme Court denying review of, or having the effect of upholding, a judgment of conviction. The court may also reduce a sentence upon revocation of probation as provided by law. Changing a sentence from a sentence of incarceration to a grant of probation shall constitute a permissible reduction of sentence under this subdivision."

adversary nature of the proceedings does not relieve the trial judge of the obligation of raising on his or her initiative, at all appropriate times and in an appropriate manner, matters which may significantly promote a just determination of the trial." 1 ABA Standards for Criminal Justice, Special Functions of the Trial Judge, Standard 6-1.1 (2d ed. 1980). See *Bozza* v. *United States*, 330 U.S. 160, 166-167 (1947) ("The Constitution does not require that sentencing should be a game in which a wrong move by the judge means immunity for the prisoner").

The defendants further contend that because each had already begun to serve his respective lawful sentence, Massachusetts common law prohibits the judge's action in this case. The defendants argue that once the sentence of probation was executed in part, the court had no power to set aside the sentence and impose a new one.

The line of cases that the defendants rely upon begins with *Commonwealth* v. *Weymouth*, 2 Allen 144 (1861). In *Weymouth* the issue presented was whether the judge, after imposing one sentence, acted illegally in increasing the defendant's sentence on the Commonwealth's motion. The court, recognizing "one of the earliest doctrines of the common law," stated that "the record of a court may be changed or amended at any time during the same term of the court in which a judgment is rendered." *Id.* at 145. The court noted that the defendant was not subjected to any greater punishment by the amended sentence than that allowed by law. *Id.* at 147. The court also noted that the defendant's sentence remained wholly unexecuted, and, if the defendant had been committed under the first sentence, that particular factor "might" have changed the result in the case. *Id.* See also *Commonwealth* v. *O'Brien*, 175 Mass. 37 (1899). Because the court did not rely on that factor in concluding that the judge had acted legally, whether the defendant's sentence was executed was not crucial to or part of the holding in the case.[13] *District Attorney for the N. Dist.* v. *Superior Court*, 342 Mass. 119, 122-126 (1961).

[13] The reasoning in the text also serves to distinguish *Commonwealth* v. *Foster*, 122 Mass. 317, 323 (1877).

Commonwealth v. *O'Brien*, *supra*, is also distinguishable. In *O'Brien*, the judge, at a later term, increased the defendant's sentence following his appeal. The court, noting that the defendant's previous sentence was an illegal one, held that the judge had the power to correct the illegality in this instance. See *Bozza* v. *United States*, *supra*. The court again stated that "a different question might have arisen" if the sentence had been executed in part. *O'Brien*, *supra* at 40. "The circumstance that the sentence may have been partly served does not appear to have been treated in the decisions as in any way material." *District Attorney for the N. Dist.* v. *Superior Court*, *supra* at 122. Thus, this court has never held that the execution of the defendant's sentence is critical to the inquiry of a judge's power to revise and revoke a defendant's sentence. We note also that rule 29 substitutes a fixed time period, i.e., sixty days, for the exercise of a judge's power in lieu of the traditional — and more uncertain — common law period of "term of court." See *District Attorney for the N. Dist.* v. *Superior Court*, *supra*. The judge here acted promptly and within the time allowed by rule 29.

b. *Double jeopardy.* The defendants next argue that they were placed twice in jeopardy when the judge revoked the suspension of their sentences and imposed prison terms. The Fifth Amendment prohibition against double jeopardy is applicable to the States through the Fourteenth Amendment to the United States Constitution. See *Benton* v. *Maryland*, 395 U.S. 784, 793-796 (1969).[14] The constitutional guarantee against double jeopardy consists of three separate protections: "It protects against a second prosecu-

[14] "In this Commonwealth, the subject of double jeopardy generally has been treated as a matter of common law rather than as a question under the Constitution of the Commonwealth." *Commonwealth* v. *Therrien*, Mass. Adv. Sh. (1981) 1108, 1111, citing *Commonwealth* v. *Diaz*, Mass. Adv. Sh. (1981) 605, 614-615, and *Commonwealth* v. *Cepulonis*, 374 Mass. 487, 491-492 (1978). See *Callinaro* v. *Commonwealth*, 362 Mass. 728, 736 (1973); Wilkins, Judicial Treatment of the Massachusetts Declaration of Rights in Relation to Cognate Provisions of the United States Constitution, 14 Suffolk U.L. Rev. 887, 923 (1980).

tion for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense" (footnotes omitted). *North Carolina* v. *Pearce*, 395 U.S. 711, 717 (1969). In other words, "the double jeopardy clause is a triptych of three separate values: (1) the integrity of jury verdicts of not guilty, (2) the lawful administration of prescribed sentences, and (3) the interest in repose." Westen, The Three Faces of Double Jeopardy: Reflections on Government Appeals of Criminal Sentences, 78 Mich. L. Rev. 1001, 1002 (1980). The first guarantee, viz., protection against prosecution after acquittal, is inapplicable in the instant case and thus we limit our discussion to the latter two aspects of the double jeopardy protection.[15]

(1) *Multiple punishment.* The double jeopardy clause safeguards a defendant from being twice punished for the same crime. See, e.g., *Gallinaro* v. *Commonwealth*, 362 Mass. 728, 735 (1973); *Ex parte Lange*, 85 U.S. (18 Wall.) 163 (1873); *United States* v. *Busic*, 639 F.2d 940, 951 (3d Cir.), cert. denied, 452 U.S. 918 (1981). Once a defendant has served fully the proper sentence prescribed by law for the offense committed, the State may not punish him again. *Id.* The Supreme Court of the United States has defined multiple punishment as that in excess of what a legislature intended to be the punishment for the particular offense. *Albernaz* v. *United States*, 450 U.S. 333, 344 (1981). Note, *United States* v. *DiFrancesco*: Court Upholds State Initiated Sentence Appeals, 32 Mercer L. Rev. 1261, 1268 (1981). See also *Commonwealth* v. *Sneed*, 3 Mass. App. Ct. 33, 34-35 (1975), and cases cited.

In a recent decision, the Supreme Court held that an increase in sentence on appellate review does not constitute multiple punishment in violation of the double jeopardy clause. See *United States* v. *DiFrancesco*, *supra*. The Court

[15] A trial judge does not impliedly acquit a defendant of any greater sentence by explicitly giving him a lower sentence. See *Chaffin* v. *Stynchcombe*, 412 U.S. 17, 23-24 (1973). Cf. *North Carolina* v. *Pearce*, 395 U.S. 711, 720 (1969).

stated: "[The] conclusion [that it does] appears to be attributable primarily to [the Court of Appeals] extending to an appeal this Court's dictum in *United States* v. *Benz*, 282 U.S. 304, 307 (1931), to the effect that the federal practice of barring an increase in sentence by the trial court after service of the sentence has begun is constitutionally based. The real and only issue in *Benz*, however, was whether the trial judge had the power to *reduce* a defendant's sentence after service had begun. The Court held that the trial court had such power. It went on to say gratuitously, however, *id.*, at 307-308, and with quotations from a textbook and from *Ex parte Lange*, 18 Wall., at 167, 173, that the trial court may not *increase* a sentence, even though the increase is effectuated during the same court session, if the defendant has begun service of his sentence. But the dictum's source, *Ex parte Lange*, states no such principle. In *Lange* the trial court erroneously imposed both imprisonment and fine, even though it was authorized by statute to impose only one or the other of these two punishments. Lange had paid the fine and served five days in prison. The trial court then resentenced him to a year's imprisonment. The fine having been paid and the defendant having suffered one of the alternative punishments, 'the power of the court to punish further was gone.' *Id.*, at 176. The Court also observed that to impose a year's imprisonment (the maximum) after five days had been served was to punish twice for the same offense. *Id.*, at 175. The holding in *Lange*, and thus the dictum in *Benz*, are not susceptible of general application. We confine the dictum in *Benz* to *Lange*'s specific context" (footnote omitted) (emphases in original). *United States* v. *DiFrancesco*, 449 U.S. at 138-139. Thus the defendants' commencement of execution of their sentences is not a factor that makes an increase in those sentences a violation of the double jeopardy clause. But see *United States* v. *Bynoe*, 562 F.2d 126, 128-129 (1st Cir. 1977).

The defendants herein pleaded guilty, inter alia, to the crime of rape which, at that time, carried the possibility of

a sentence of life imprisonment or for any term of years. G. L. c. 265, § 22, as then amended by St. 1974, c. 474, § 1. At the hearing, the judge, pursuant to Mass. R. Crim. P. 29, revoked the defendants' suspended sentences and ordered them to stand committed in execution of their sentences. The defendants were not cumulatively sentenced to jail for a greater term than proscribed by the Legislature, thus, they were not punished twice for the same offense.

(2) *Finality.* The defendants contend that their expectation of finality in the original sentences is protected by the double jeopardy clause and this right was violated by the judge's action in this case. The constitutional prohibition against placing a defendant twice in jeopardy "represents a constitutional policy of finality for the defendant's benefit" in criminal proceedings. *United States* v. *Jorn*, 400 U.S. 470, 479 (1971) (plurality). The protection against double jeopardy ensures that the State will not be allowed to make repeated attempts to convict an individual for an alleged offense, thus compelling him to live in a constant state of anxiety and insecurity. *Green* v. *United States*, 355 U.S. 184, 187-188 (1957). See also M. Friedland, Double Jeopardy 4 (1969).

We have in the past stated that "[s]entence is final judgment in a criminal case, and that is the end of the case, *apart from statutory provisions* [and common law exceptions], so far as concerns the usual and ordinary control of the court" (emphasis added). *Fine* v. *Commonwealth*, 312 Mass. 252, 256 (1942). A sentence is final, subject to the limited power of the judge pursuant to Mass. R. Crim. P. 29 to revise and revoke it. This power is limited because it may only be exercised "if it appears that justice may not have been done" within sixty days after imposition of the original sentence. The defendants should not have had an expectation of finality in their sentences in the face of this rule. *United States* v. *DiFrancesco*, *supra* at 136, appears to be dispositive of the double jeopardy claims of the defendants. There, the Court held that a sentence appealable by the Government by virtue of 18 U.S.C. § 3576 (1970) was not

final until the appeal was consummated, or the time for the appeal had lapsed. The Court concluded, therefore, that the increase of a sentence in such circumstances would not constitute multiple punishment in violation of the double jeopardy clause. *Id.* at 139-140.[16] The conditional nature of a sentence under the sixty-day period for revision or revocation pursuant to rule 29 is analogous. Cf. *Commonwealth* v. *Sawicki*, 369 Mass. 377 (1975). The sixty-day requirement of rule 29, coupled with the required finding that "justice may not have been done," reasonably balances the defendant's interest in finality against society's interest in law enforcement.

3. *Resentencing procedure.* Although we conclude that the sentencing judge herein had the power to vacate the original sentences and impose new ones, the defendants were given neither notice nor an opportunity to be heard at the hearing and, thus, we order resentencing. See *Katz* v. *Commonwealth*, Mass. Adv. Sh. (1979) 2581, 2591 (remedy for error in sentencing is resentencing).

A person whose legal rights are to be affected by a hearing should have notice of the issues. Cf. *Hicks* v. *Commonwealth*, 345 Mass. 89, 92 (1962), cert. denied, 374 U.S. 83[illegible] (1963). The revision proceeding denied the defendants all of the notice and hearing rights they would have had at an original sentencing proceeding under Mass. R. Crim. P. 28, 378 Mass. 898 (1979), or at a revision proceeding initiated by a defendant's own motion under Mass. R. Crim. P. 29, or at a revision proceeding before the Appellate Division of the Superior Court under G. L. c. 278, §§ 28A-28C. We find nothing in this record to warrant the judge's precipitous action. To construe rule 29 differently from these other sentencing provisions when the trial judge acts on his own motion, would be an anomaly. The judge who seeks to re-

[16] We are bound, of course, by the Court's interpretation of the double jeopardy clause. We agree with the view of both the majority and the dissent in *United States* v. *DiFrancesco*, 449 U.S. 117, 133, 147 (1980), that the common law writs of autre fois acquit and autre fois convict are protections against retrial, not resentencing.

vise and revoke on his own motion must give adequate notice and an opportunity to be heard to the criminal defendant. He should also state clearly on the record why it appears that "justice may not have been done" by the terms of the original sentence. "Of course, in [the circumstance where the sentences are] being revised upward, findings and a statement of supporting reasons are important to demonstrate that improper considerations did not motivate the judge's action." *Commonwealth* v. *Sitko*, 372 Mass. 305, 314 (1977). In the circumstances, the judge may conclude that he should recuse himself from participating in further proceedings in these cases.

4. *Disposition.* The sentences are to be vacated and the defendants are to be resentenced in a manner consistent with this opinion.

So ordered.

NOLAN, J. (dissenting). I dissent. The rape statute applicable to this case provides as punishment "imprisonment in the state prison for life or for any term of years." G. L. c. 265, § 22, as then amended by St. 1974, c. 474, § 1. At the time of the commission of the rape to which these defendants pleaded guilty, another statute, G. L. c. 279, § 1, provided that the execution of a sentence of a defendant convicted of a crime punishable by death or imprisonment for life shall not be suspended. Under § 22, rape is punishable by life imprisonment. It should follow, therefore, that a sentence for rape whether for life or for any term of years, cannot be suspended. The words "or for any term of years" do not render this crime any less punishable by life imprisonment if a judge chooses to impose a sentence of a term of years. These words simply permit a less drastic sentence. It is the fact that a judge may sentence a defendant to life imprisonment that brings it under G. L. c. 279, § 1.

If the Legislature had intended the interpretation placed on the statute by the court today, it could have changed the

language in one of two ways. First, the statute could have provided that the prohibition against a suspended sentence was operative only if a life imprisonment sentence were actually imposed. Second, the Legislature could have said that any sentence short of life imprisonment might be suspended. It has chosen neither option. However, the court today, by a route too tortuous for me to follow, arrives at an interpretation diametrically opposite the clear commandment of this statute. It refuses to accept the clarity of the language chosen by the Legislature in writing G. L. c. 279, § 1, and embarks on a journey of hermeneutics which leads to a conclusion which could not have been imagined by the lawmakers. The court has read doubt into a statute which is clear. It has constructed barriers to a simple and uncomplicated reading of a statute. The gloss which the court has given to the statute has created the very ambiguity on which it relies when it invokes the canon of strict construction against the Commonwealth. In short, it has taken lucid language and made it murky.

Accordingly, I dissent in the main from part 1 of the opinion. I join in the rest of the opinion except where consistency with my dissent from part 1 demands a different result.

Where sentence as imposed on two indictments exceeded the maximum penalties provided by statute (M.G.L.A. c. 209, § 10) for those offenses, the Appeals Court would vacate those sentences and remand the case to superior court for imposition of new sentences, although no exception was taken by defendant to imposition of those sentences. Com. v. Burkett (1975) 326 N.E.2d 731, 3 Mass. App. 744.

Judgments, insofar as they imposed death sentences, could not stand, and defendant, convicted of murder and armed robbery, was entitled to be resentenced to life imprisonment. Com. v. Valliere, (1974) 321 N.E.2d 625, 366 Mass. 479.

24. Sentencing after retrial

Superior court, before which defendants were convicted of possession of obscene motion picture film with intent to disseminate after they appealed from their convictions of such offense in municipal court, was not precluded from imposing greater fines or sentences than had been imposed by municipal court on theory that imposition of heavier penalties would impermissibly penalize defendants for exercising their right to trial by jury and would chill the exercise of their U.S.C.A.Const. Amend. 1 rights. Com. v. Mascolo (1978) 375 N.E. 2d 17, — Mass.App. —, certiorari denied 99 S.Ct. 265, 439 U.S. 899, 58 L.Ed. 2d 247.

Upon vacation of judgments on ground that defendant was entitled to new trial because of defect in proceeding in which guilty plea was accepted and sentence imposed, defendant would face possibility of retrial which might result in severer sentences. Com. v. Foster (1975) 330 N.E.2d 165, 366 Mass. 100.

25. Review, generally

Error in the sentence of the court appealed from was no ground for dismissing the complaint in the appellate court. Com. v. Calhane (1871) 108 Mass. 431; Com. v. Tinkham (1850) 80 Mass. 12, 14 Gray 12.

Error of law which occurs in sentencing is appropriate matter for appellate relief. Com. v. Longval (1979) 390 N.E. 2d 1117, — Mass. —.

Ordinarily Supreme Judicial Court does not have jurisdiction to review sentences imposed on coparticipants in same crime for alleged improper disparity. Id.

Rule 29

REVISION OR REVOCATION OF SENTENCE

(Applicable to District Court and Superior Court)

(a) Revision or Revocation. The trial judge upon his own motion or the written motion of a defendant filed within sixty days after the imposition of a sentence, within sixty days after receipt by the trial court of a rescript issued upon affirmance of the judgment or dismissal of the appeal, or within sixty days after entry of any order or judgment of an appellate court denying review of, or having the effect of upholding, a judgment of conviction, may, upon such terms and conditions as he shall order, revise or revoke such sentence if it appears that justice may not have been done.

(b) Affidavits. If a defendant files a motion pursuant to this rule, he shall file and serve and the prosecutor may file and serve affidavits in support of their respective positions. The judge may rule on a motion filed pursuant to this rule on the basis of facts alleged in the affidavits without further hearing.

(c) **Notice.** The defendant shall serve the prosecutor with a copy of any motion and affidavit filed pursuant to this rule. If the judge orders that a hearing be held on the motion, the court shall give the parties reasonable notice of the time set for the hearing.

(d) **Place of Hearing.** A motion filed pursuant to this rule may be heard by the trial judge wherever he is then sitting.

Reporter's Notes

Rule 29 is drawn in part from Fed.R.Crim.P. 35 and from former G.L. c. 278, §§ 29A (St.1959, c. 167, § 1) and 29C (St.1962, c. 810, § 2). *See* Rules of Criminal Procedure (U.L.A.) rule 633 (1974).

Subdivision (a). General Laws c. 278, § 29A, which was applicable to sentences imposed upon a plea without trial in the District Court, and § 29C, which was applicable to sentences imposed after plea or trial in the Superior Court provided the 60-day limit incorporated into this subdivision. It should be noted that under §§ 29A and 29C, a sentence could only be revised or revoked within 60 days after imposition; pursuant to this subdivision, a sentence may be revised or revoked at any time so long as the defendant's motion is *filed* within 60 days after imposition of the sentence, or within 60 days after the finality of the conviction is established upon direct appeal or after such review is denied or withdrawn. This subdivision enlarges the power of the District Court so that it is commensurate with that of the Superior Court under former G.L. c. 278, § 29C so as to enable the judge to revise or revoke a sentence imposed after a trial in the District Court. Under prior practice, a de novo appeal to the Superior Court was deemed to vacate the District Court judgment and to "render immaterial . . . all . . . errors and irregularities in the proceedings" below. Commonwealth v. Holmes, 119 Mass. 195, 199 (1875). *Accord* Enbinder v. Commonwealth, 368 Mass. 214, 217, 330 N.E.2d 846 (1975). For that reason, G.L. c. 29A expressly did not apply to appealed cases. Now, under this rule, a claim of appeal from a District Court jury-waived session to a jury session divests the judge who imposed the original sentence of the power to revise or revoke that sentence.

The rule governs reductions of sentences motivated by demands of fairness. It is thus a rule which accords the trial judge broad discretion. As was stated in District Attorney for the Northern District v. Superior Court, 342 Mass. 119, 172 N.E.2d 245 (1961):

> Occasions inevitably will occur where a conscientious judge, after reflection or upon receipt of new probation reports or other information, will feel that he has been too harsh or has failed to give due weight to mitigating factors which properly he should have taken into account.

Id. at 128. If within sixty days after sentence has been imposed, the trial judge for any reason feels the sentence that has been imposed is too harsh, he is permitted to reduce it sua sponte, although he is not permitted to consider events occurring after the original imposition. Commonwealth v. Sitko, Mass.Adv.Sh. (1977) 668, 676–78, 363 N.E.2d 303.

Subdivision (a) speaks only in terms of a motion by the defendant, although prior practice motions of the Commonwealth to revise or revoke sentence were not unknown. *Commonwealth v. Sitko, supra.*

The 60-day period established by the rule is absolute, and the trial judge has no power to extend the time within which the motion must be filed or within which the sentence may be altered *sua sponte*. Mass.R.Crim.P. 46(b); Commonwealth v. Burrone, 347 Mass. 451, 198 N.E.2d 407 (1964). However, under this rule, once the motion is filed, he may act on it at a time later than 60 days.

The view under the common law was that so long as nothing had been done to carry a sentence into execution, "it was, in contemplation of law, in the breast of the court, and subject to revision and alteration." Commonwealth v. Weymouth, 84 Mass. (2 Allen) 144, 145–46, 79 Am.Dec. 776 (1862). The modern view is that a sentence may be *reduced* by judicial action even though the defendant has commenced serving it. District Attorney for the Northern District v. Superior Court, 342 Mass. 119, 126–28, 172 N.E.2d 245 (1961). That an increase in the sentence once execution has commenced is not permitted has, however, long been settled. United States v. Benz, 51 S.Ct. 113, 282 U.S. 304, 307–09, 75 L.Ed. 354 (1931); Ex parte Lange, 85 U.S. (Wall.) 163, 167–74, 21 L.Ed. 872 (1873).

A mistake in the mittimus under which a defendant is serving his sentence may be corrected at any time because such a revision does not change the sentence imposed, only the transcription of that sentence. Bolduc v. Commissioner of Correction, 355 Mass. 765, 247 N.E.2d 561 (1969).

Subdivision (b). The objective of subdivision (b) is to encourage the disposition of post-conviction motions upon affidavit. Presently, the rule in Massachusetts is that the use of affidavits in lieu of oral testimony is discretionary with the trial judge. Commonwealth v. Coggins, 324 Mass. 552, 87 N.E.2d 200 (1949). The only change contemplated by this subdivision is that the use of this established procedure is to be extended to all cases where it is deemed appropriate by the trial judge. *See* Mass.R.Crim.P. 30(c)(3).

Subdivision (c). The provision of Mass.R.Crim.P. 32, relative to service and notice, are incorporated by this subdivision.

Subdivision (d). This provision is paralleled in subdivision (c)(7) of Mass.R.Crim.P. 30 and is intended to expedite the disposition of motions for post-conviction relief.

APPENDIX C

Law Offices
P. J. Piscitelli

P. J. PISCITELLI
GEOFFREY A. DONENICO
EDWARD D. MURPHY
J. RUSSELL NODODON
DONALD A. HARWOOD

281 Pleasant Street · Brockton, Massachusetts 02401-0857
617 586-1055

IN REPLY PLEASE REFER TO FILE NO. C-1880

May 25, 1982

The Honorable Edward F. Hennessey
Chief Justice
Supreme Judicial Court
New Courthouse
Pemberton Square
Boston, MA 02108

RE: PETITION FOR REHEARING
MARK S. SAVOY v. COMMONWEALTH
ALEXANDER ALDOUPOLIS v. COMMONWEALTH
RICHARD DOVEL v. COMMONWEALTH
JOHN STRICKLAND v. COMMONWEALTH
ROBERT J. TARR v. COMMONWEALTH
Supreme Judicial Court No. 2677

Dear Justice Hennessey:

Please accept this letter as a petition for rehearing pursuant to Mass.R.App.P. 27 in the above captioned matter. The petitioners (hereinafter the "defendants") contend that the following points of law have been overlooked and misapprehended by this Court.

I. The defendants submit that the framing of the disposition by this Court is inconsistent with the Court's opinion.

It is uncontroverted that the Superior Court Judge originally imposed three to five year Walpole sentences, suspended, one year probation and five hundred dollars in court costs upon the defendants; and that, four days later, he revised and revoked the sentences without prior notice to the parties, and imposed a committed three to five year Walpole sentence, citing as grounds the "questioned validity" of the suspended sentences, and "the statements of the District Attorney objecting to [his] . . . imposing a suspended sentence, as well as a desire to have this case tried on its merits" (R.186).

It would be consonant with the body of this Court's decision to remand the matter to the lower court for action consistent with this Court's opinion. Such a directive would leave it open to the lower court judge to take any action at all. It may be that the original sentencing judge, or his substitute in the event of recusal, will decide that this Court's holding that the original suspended sentences were valid obviates the need for resentencing. Or the judge may reconsider the grounds for the revision and revocation, and conclude that an alteration of the existing sentence is not called for.*

In any event, a disposition by this Court placing no specific onus upon the trial court to take any action, whether it be resentencing or otherwise, more properly reflects the opinion of this Court. Therefore, the defendants respectfully request that this Court amend its disposition to read: The sentences imposed on October 9, 1981, are to be vacated, and the matter is remanded to the court below for action consistent with this opinion.

II. The opinion fails adequately to address the specific factual situation of this case, and the problems which might arise in future cases, where criminal defendants plead guilty upon a joint sentence recommendation, the trial judge accepts the recommendation, but later revises the sentence upwards.

This Court, in ordering resentencing, has failed to consider that the court below offered the defendants an option to stand committed upon the amended sentence, or to withdraw their guilty

---

* Since the initial sentences were valid, the trial judge's only remaining stated grounds for revision and revocation are the "public interest in the sentences". Surely public interest, or even disinterest, is an improper criterion for increasing the severity of a criminal sentence. Cf. Commonwealth v. Sitko, 372 Mass. 305 (1977).

pleas pursuant to Mass.R.Crim.P. 12(c)(2)(B)** and proceed to trial. This Court's disposition, in ignoring any reference to this option, appears to rescind such an opportunity.

This question should be addressed, either in the text of the opinion or in the disposition, not only for guidance to these defendants and the trial court in the instant case, but for purposes of clarifying the interrelationship between Mass.R.Crim.P. 12 and 29 in future matters.

Section (c)(6) of Rule 12 provides:

> If the judge determines that he will impose a sentence that will exceed an agreed recommendation for a particular sentence or type of punishment under subdivision (b)(1)(C) of this rule or an agreed recommendation for a particular disposition other than incarceration under subdivision (b)(1)(E), after having informed the defendant as provided in subdivision (c)(2)(A) that he would not do so, he shall, on the record, advise the defendant personally in open court or on a showing of cause, in camera, that he intends to exceed the terms of the plea recommendation and shall afford the defendant the opportunity to then withdraw his plea. The judge may indicate to the parties what sentence he would impose.

Thus, where a trial judge has informed a defendant under Rule 12(c)(2)(A) that he will not exceed a sentence recommendation made pursuant to Rule 12(b)(1)(C) or (E)

** Perhaps the judge intended to invoke Mass.R.Crim.P. 12(c)(2)(A), which allows the judge to inform the defendant that, if he decides to exceed a sentence recommendation, the defendant may withdraw his plea.

without first affording the defendant an opportunity to withdraw the plea, and he does indicate that he will exceed the recommendation, he must give the defendant a chance to withdraw his plea.

The Court's ruling in this case raises doubt that a judge is so confined by Rule 12(c)(6) when later revising a sentence on his own motion under Rule 29. Of course, he should be, and this Court should explicitly state that Rule 29 must be read in light of the requirements of Rule 12(c)(6), and order that the defendants here may also withdraw their guilty pleas if the trial judge exceeds the original sentence upon resentencing.

III. This Court's holding that the trial judge's action in increasing the defendants' sentences under Mass.R.Crim.P. 29 did not violate the double jeapardy clause is legally unsound.

This Court concluded that the defendants' arguments that a criminal defendant's interest in the finality of his sentence, an interest protected through the Double Jeopardy Clause, see, e.g., United States v. Jorn, 400 U.S. 470, 479 (1971), are disposed of by the United States Supreme Court's decision in United States v. DiFrancesco, 449 U.S. 117 (1980). They are not.

DiFrancesco involved a Federal statute (18 U.S.C. §3576) which permitted appeals by the Government from a sentence of a criminal defendant designated as a "dangerous special offender". The language of that statute is, as the Court pointed out, id., at 138-139, clear and incapable of misunderstanding:

> With respect to the imposition, correction, or reduction of a sentence after proceedings under section 3575 of this chapter, a review of the sentence on the record of the sentencing court may be taken by the defendant or the United States to a court of appeals.

18 U.S.C. §3576 (emphasis added). Accordingly, the Court concluded that a defendant's interest in the repose of his sentence has no bearing "where, as in the dangerous

special offender statute, Congress has specifically provided that the sentence is subject to appeal". Id., at 139.

Rule 29 had no such clarity for these defendants, nor for anyone else. Rule 29 is essentially no different from its predecessor, G.L. c.278, §29. Through a long line of Massachusetts cases, reflected in the Reporter's Notes following the rule, it had always been said that a sentence could not be revised upwards upon the initiative of the court or the prosecution when execution of the sentence had commenced. See, e.g., District Attorney for the Northern District v. Superior Court, 343 Mass. 119, 125-126 (1961); Commonwealth v. Fine, 312 Mass. 252, 256 (1942). Granted no Massachusetts case had specifically condemned an upward sentence revision after the start of execution; but all pronouncements by this Court certainly led to that conclusion. Hence, if a specifically worded statute permitting an increase in a sentence is required to avoid double jeopardy implications, as DiFrancesco says it is, then Rule 29 does not pass constitutional muster for these defendants. Whatever may be the expectation of finality for future defendants under Rule 29 as a result of this decision, it cannot be said that these defendants were put on proper notice that their sentences were subject to review and increase upon the court's motion.

The defendants' finality argument is made more forceful by the ambiguity in the Court's decision concerning the time limitations imposed upon a judge's revision of a sentence. It has, of course, been the long-standing practice for criminal defendants to file their motions to revise and revoke within the sixty day period, and then move for a hearing when the time seems most propitious. See Commonwealth v. Layne, Mass.Adv.Sh. (1982) ___. It would be highly anomalous to read Rule 29 as requiring a different standard for the judge . If such is the case, the Court's determination that the "sixty day requirement of Rule 29" satisfies the defendants' interest in finality is misplaced, because, under existing practice, the filing of the motion to revise and revoke within the sixty day period permits hearing and action upon the motion within a reasonable period following the expiration of the sixty days. If this Court is imposing a strict sixty day requirement

upon the trial judge to move and act upon the revision and revocation, it should clearly say so, and, possibly, explain what language in Rule 29 permits the different treatment.

Therefore, the defendants request that this Court hold that the action of the court below in increasing their sentences violated the Double Jeopardy Clause.

Very truly yours,

P. J. PISCITELLI
Attorney for
Mark S. Savoy

WILLIAM T. PRITCHARD
Attorney for
John Strickland

STEPHEN HRONES
Attorney for
Alexander Aldoupolis

JOSEPH R. WELCH
Attorney for
Robert J. Tarr

MARIE T. BUCKLEY
Attorney for
Richard Dovel

PJP:mab

cc: Charles J. Hely, Esq.
Assistant District Attorney
Norfolk County

SUPREME JUDICIAL COURT FOR THE COMMONWEALTH
ROOM 1412 COURT HOUSE
BOSTON, MASSACHUSETTS 02108
(617) 723-8055

PATRICK J. HURLEY
Clerk

FREDERICK J. QUINLAN
Assistant Clerk

June 3, 1982

P. J. Piscitelli, Esq.
281 Pleasant Street
Brockton, Massachusetts 02401-0837

Dear Mr. Piscitelli: Re: Alexander Aldoupolis vs. Commonwealth
(and four companion cases)
Supreme Judicial Court No. SJC-2677

With reference to the above captioned case your Petition for Rehearing has been considered by the court and is denied. Your Motion to File Petition Late was allowed.

Very truly yours,

Clerk

c.c.: Charles J. Hely, A.D.A.
Norfolk Superior Court
618 High St., Dedham 02026

Stephen Hrones, Esq.
190 High St., Boston 02110

William H. Pritchard, Esq.
289 Union St., Holbrook 02343

Joseph R. Welch, Esq.
10 Diauto Drive, Randolph 02368

Barbara A. H. Smith, A.A.G.
Office of the Attorney General
1 Ashburton Place, Boston 02108

Marie T. Buckley, Esq.
Massachusetts Defenders Committee
120 Boylston St., Boston 02116

Terence J. McCarthy, Esq.
354 Washington St., Braintree 02184

APPENDIX E

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS. SUPREME JUDICIAL COURT
NO. 81-335 CIVIL, 2677

ALEXANDER ALDOUPOLIS

v.

COMMONWEALTH OF MASSACHUSETTS

PETITIONER'S MOTION TO STAY RE-SENTENCING TO ALLOW FILING OF PETITION TO THE UNITED STATES SUPREME COURT FOR WRIT OF CERTIORARI

Now comes the Petitioner and moves this Honorable Court to stay his re-sentencing by the Superior Court so as to allow him to file a petition to the United States Supreme Court for a Writ of Certiorari.

In support of this motion Petitioner states as follows:

1. On Friday, June 25, 1982, at about 4:30 p.m. Petitioner's counsel was informed by a clerk of the Norfolk Superior Court that a judge of that court had ordered Petitioner to appear for re-sentencing at 10 a.m. on Thursday, July 1, 1982.

2. On June 23, 1982 judgment had issued from the Supreme Judicial Court of Suffolk County ordering re-sentencing pursuant to a decision of the Full Bench of the Supreme Judicial Court of May 13, 1982. See Alexander Aldoupolis vs. Commonwealth, 386 Mass. 260 (1982).

3. Petitioner asserts that there exists a very substantial question as to whether United States vs. DiFrancesco, 449 U.S. 117 (1980) is dispositive of the double jeopardy claim raised. For the case at bar can be distinguished from the former. In DiFrancesco the defendant had clear notice of the non-finality of his sentence as the Government had a statutory right of direct appeal of the sentence. In the actual case Petitioner had no such reason to question the finality of his suspended sentence of October 5, 1981 as there was no direct right of appeal of sentence by the prosecution and no judge, it is believed, had ever employed Rule 29 to increase a sentence "in the interests of justice." In fact, the Reporters Notes to Rule 29 state that the Rule governs reductions of sentences. Reporter's Notes to Mass. R. Crim. P. 29, Mass. Ann. Laws, Criminal Procedure at 474 (Michie, Law Co-op 1979). Nor does Massachusetts case law support the right of a judge to increase a sentence in the interests of justice once it has been executed and commenced being served.

4. It should be noted that DiFrancesco was a 5-4 decision, with the four dissenters present members of the Court. Two members of the majority in that case, Justice Rehnquist and Chief Justice Burger, stated in Whalen v. United States, 444 U.S. 684, 703 (Rehnquist, J. dissenting) handed down just before DiFrancesco, that "Ex parte Lange prevents a sentencing court from increasing a defendant's sentence... even though the

second sentence is within the limits set by the legislature." This suggests that a majority of the court would not allow increased sentences without the notice of lack of finality present in DiFrancesco. It should also be noted that Justice Blackmun, who wrote the majority opinion in DiFrancesco, later wrote the majority opinion in Bullington v. Missouri, 451 U.S. 830 (1981) which affirmed that the double jeopardy clause applies to the sentencing process.

5. Defendant's constitutional right not to be placed in double jeopardy cannot be protected unless the re-sentencing is stayed since that very proceeding itself violates his right not to be put in jeopardy. See Abney v. U.S., 431 U.S. 651, 658-61 (1977).

6. Since there is a "fair prospect of reversal" of this court's decision and because there is good possibility that at least four Justices of the Supreme Court will vote to grant certiorari, the request to this court for a stay is a reasonable one. See Re Walter Roche, 448 U.S. 1312 (1980) (Brennan, J. Circuit Justice).

7. Petitioner respectfully requests action on this motion before 5 p.m. on Tuesday, June 29 so as to allow him the opportunity to present an Application for Stay to the United States Supreme Court on Wednesday, June 30, thus allowing a decision from that court

before the re-sentencing date of July 1, 1982 at 10 a.m.

8. On Monday, June 28, 1982, Petitioner filed a Complaint under 42 U.S.C. 1983 in United States District Court requesting that the re-sentencing on July 1 be enjoined. That request is now under advisement by Judge Robert Keeten with no decision expected before late Wednesday, June 30, thus allowing little time for additional attempts to obtain a stay in other forums.

By his attorney,

Stephen Hrones
190 High Street
Boston, MA 02110
(617) 451-5151

APPENDIX F

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS. SUPREME JUDICIAL COURT
NO. 81-335 CIVIL, 2677

ALEXANDER ALDOUPOLIS

vs.

COMMONWEALTH OF MASSACHUSETTS

ORDER OF COURT

Upon consideration of the Petitioner's Motion to Stay Re-Sentencing to Allow Filing of Petition to the United States Supreme Court for Writ of Certiorari filed in the above case on June 29, 1982, it is hereby ORDERED that said motion be, and the same hereby is, DENIED.

By the Court,

Frederick J. Gaudiano

Entered: June 29, 1982 Assistant Clerk

APPENDIX G

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

ALEXANDER ALDOUPOLIS, Plaintiff	
v.	CIVIL ACTION NO. 82-1795-K
SUPERIOR COURT DEPT. OF THE TRIAL COURT OF MASSACHUSETTS, Defendant	

June 30, 1982
Memorandum

Keeton, D.J.:

I.

The complaint in this case seeks an injunction, attorney's fees, costs, and other relief for alleged violations of plaintiff's constitutional right, secured by the Fifth and Fourteenth Amendments, not to be placed in double jeopardy. He sues under 42 U.S.C. § 1983, asserting jurisdiction pursuant to 28 U.S.C. § 1343.

Plaintiff alleges as follows: Having been charged before the Norfolk Superior Court of rape and having there pled guilty, on October 5, 1981, he was sentenced to from three to five years at the Massachusetts Correctional Institution, Walpole (MCI Walpole); execution of sentence of imprisonment suspended; two years probation; and payment of court costs of $500 at the rate of $5 per week. Before October 9, 1981, he commenced serving his sentence by signing a probation contract and beginning payment of the imposed court costs. On October 9, 1981, the trial judge revoked the suspension of sentence and ordered plaintiff committed to MCI Walpole if he did not elect to withdraw his guilty plea by October 13, 1981. Plaintiff obtained a stay of the Superior Court proceedings on October 9, 1981, from a single justice of the Supreme Judicial Court of Massachusetts. On May 13, 1982, the Supreme Judicial Court vacated the Superior Court sentence and ordered resentencing. On June 3, 1982, the Supreme Judicial Court denied plaintiff's motion for rehearing. Plaintiff alleges that resentencing is scheduled for 10:00 a.m. on July 1, 1982.

Plaintiff contends that the order for resentencing, entered after plaintiff had commenced serving a legally imposed sentence, violates his right, secured by the Fifth and Fourteenth Amendments, not to be placed in double jeopardy.

The matter now before the court is plaintiff's motion for a preliminary injunction prohibiting resentencing.

Neither party offered evidence at the hearing, and it does not appear that there is any relevant dispute of fact. For the purposes of ruling on this motion, I assume that the allegations stated above are factually correct.

II.

The Supreme Judicial Court, in Alexander Aldoupolis v. Commonwealth, S-2677 (May 13, 1982), determined that, under Mass. R. Crim. P. 29, a trial judge's sentence in a criminal case is subject to the condition that the trial judge may revise the sentence to a more severe one than that initially imposed, acting upon his own motion within the time period fixed by the Rule. The decision of the Supreme Judicial Court is, of course, an authoritative determination of Massachusetts law.

III.

Plaintiff argues that the Massachusetts law as applied to him violates his right, secured by the Fifth and Fourteenth Amendments, not to be placed in double jeopardy. This precise issue has not been previously decided by the Supreme Court. The decision most nearly in point is United States v. DiFrancesco, 449 U.S. 117 (1980), holding that the Double Jeopardy Clause of the Fifth Amendment is not violated by the Organized Crime Control Act of 1970, 18 U.S.C. § 3576, which authorizes in limited circumstances a government appeal to seek lengthier imprisonment than was imposed by the trial judge. The Court's opinion (in which five members of the Court joined) at one point (in part V) states the holding in a way that may be read narrowly:

> Although it might be argued that the defendant perceives the length of his sentence as finally determined when he begins to serve it, and that the trial judge should be prohibited from thereafter increasing the sentence, that argument has no force where, as in the dangerous special offender statute, Congress has specifically provided that the sentence is subject to appeal. Under such circumstances there can be no expectation of finality in the original sentence.

449 U.S. at 139. One might reasonably argue that no state law comparable to the dangerous special offender statute is involved here and that this case is thus outside the reach of DiFrancesco. Earlier in the Court's opinion in that case, however, a rationale of broader reach is developed. For example:

> It is acquittal that prevents retrial even if legal error was committed at the trial. United States v. Ball, 163 U.S. 662 (1896). This is why the "law attaches particular significance to an acquittal." United States v. Scott, 437 U.S., at 91. Appeal of a sentence, therefore, would seem to be a violation of double jeopardy only if the original sentence, as pronounced, is to be treated in the same way as an acquittal is treated, and the appeal is to be treated in the same way as a retrial. Put another way, the argument would be that, for double jeopardy finality purposes, the imposition of the sentence is an "implied acquittal" of any greater sentence.
>
> * * *
>
> We agree with the Government that this approach does not withstand analysis.
>
> * * *
>
> Historically, the pronouncement of sentence has never carried the finality that attaches to an acquittal. ... The trial court's increase of a sentence, so long as it took place during the same term of court, was permitted. This practice was not thought to violate any double jeopardy principle. ... This accounts for the established practice in the federal courts that the sentencing judge may recall the defendant and increase his sentence, at least (and we venture no comment as to this limitation) so long as he has not yet begun to serve that sentence. See, e.g., United States v. DiLorenzo, 429 F.2d 216, 221 (CA2 1970), cert. denied, 402 U.S. 950 (1971); Vincent v. United States, 337 F.2d 891, 894 (CA8 1964), cert. denied, 380 U.S. 988 (1965). Thus it may be said with certainty that history demonstrates that the common law never ascribed such finality to a sentence as would prevent a legislative body from authorizing its appeal by the prosecution.

Id. at 132-34.

Although DiFrancesco is not directly in point, the rationale of the Court lends support to the Commonwealth's position here. In these circumstances, I conclude that the plaintiff has failed to show probability of success on the merits of his Double Jeopardy claim. Because of plaintiff's failure to meet this essential requirement of injunctive relief, I need

not and do not consider whether other prerequisites to a preliminary injunction are satisfied. Also, I do not consider whether in any event this court should abstain, see Younger v. Harris, 401 U.S. 37 (1971),[1] or should treat this complaint as analogous to a petition for habeas corpus and apply requirements applicable in that context.[2]

Plaintiff's motion for preliminary injunction must be denied.

Robert E. Keeton

United States District Judge

---

1. Under the doctrine of Younger v. Harris and Samuels v. Mackell, 401 U.S. 66 (1971), federal courts are barred from enjoining state criminal proceedings "except in very unusual situations, where necessary to prevent immediate irreparable injury," Samuels at 69, which is "'both great and immediate,'" Younger at 46, quoting Fenner v. Boykin, 271 U.S. 240, 243 (1926). It may be doubted that what plaintiff faces here--the possibility of the revocation of probation at resentencing--satisfies the "irreparable injury" requirement.

2. Plaintiff, in requesting relief under 42 U.S.C. § 1983, may be proceeding under the wrong statute. It is at least arguable that habeas corpus, 28 U.S.C. § 2254, is the exclusive remedy of a plaintiff who challenges "the very fact or duration" of his confinement, Preiser v. Rodriguez, 411 U.S. 475, 500 (1973), including challenges to "future confinement," id. at 487. Were plaintiff requesting habeas relief, his request for bail, the habeas analogue to a 1983 request for a temporary restraining order or a preliminary injunction, would be denied because of his inability to present "a clear case on the law," see Eaton v. Holbrook, No. 81-1884 (1st Cir. March 5, 1982); Glynn v. Donnelly, 470 F.2d 95, 98 (1st Cir. 1972). Plaintiff, of course, may return to federal court for a full adjudication of any habeas claim; in that case, he will have to establish that he is held "in custody in violation of the Constitution or laws or treaties of the United States," 28 U.S.C. § 2254(a) and that he has exhausted available state remedies, 28 U.S.C. § 2254(b).

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

ALEXANDER ALDOUPOLIS, Plaintiff	
v.	CIVIL ACTION NO. 82-1795-K
SUPERIOR COURT DEPT. OF THE TRIAL COURT OF MASSACHUSETTS, Defendant	

June 30, 1982
ORDER

For the reasons stated in the Memorandum of this date, it is ORDERED:

Plaintiff's Motion for Preliminary Injunction is denied.

Robert E. Keeton

United States District Judge

APPENDIX H

UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

No. 82-1532.

MARK S. SAVOY,
Plaintiff, Appellant,

v.

THE SUPERIOR COURT DEPARTMENT OF THE
TRIAL COURT OF MASSACHUSETTS,
Defendant, Appellee.

No. 82-1533.

ALEXANDER ALDOUPOLIS,
Plaintiff, Appellant,

v.

THE SUPERIOR COURT DEPARTMENT OF THE
TIRAL COURT OF MASSACHUSETTS,
Defendant, Appellee.

ORDER OF COURT

Entered June 30, 1982

For the reasons stated by the district court the motions seeking to enjoin the proceedings in the state court pending appeal are denied.

By the Court:

/s/ DANA H. GALLUP

Clerk.

[Cert. c., Clerk, U.S.D.C., Mass.; cc: Mr. Hrones, Mr. Piscitelli and Ms. Smith.]

COMMONWEALTH OF MASSACHUSETTS

NORFOLK, SS SUPERIOR COURT

COMMONWEALTH

vs.

ROBERT J. TARR [Nos. 76300-02]

and

MARK SAVOY [Nos. 76308-10]

and

JOHN STRICKLAND [Nos. 76312-14]

and

RICHARD DOVEL [Nos. 76316-18]

and

ALEXANDER ALDOUPOLIS [Nos. 76320-22]

Norfolk County 1st Criminal
Dedham, Massachusetts
Thursday, July 1, 1982

Before: DONAHUE, J.

TRANSCRIPT OF PROCEEDINGS

APPEARANCES:

Gerald Kirby, Esq., Asst. District Attorney, For Commonwealt

Joseph R. Welch, Esq., For the defendant Tarr
P. J. Piscitelli, Esq., For the defendant Savoy
William H. Pritchard, Esq., For the defendant Strickland
Pamela Hattem, Esq., For the defendant Dovel
Stephen Hrones, Esq., For the defendant Aldoupolis

Catherine McEllin
Official Court Reporter
Suffolk County Superior Court

Thursday, July 8, 1982

[All Defendants present with their Counsel.]

THE CLERK. This is Norfolk Criminal Docket Nos. 76300 through 76322, cases of the Commonwealth vs. Robert J. Tarr, Mark Savoy, John Strickland, Richard Dovel and Alexander Aldoupolis.

Your Honor, these cases are here for disposition this morning.

THE COURT. The record will reflect this Court has received an Order from the Supreme Judicial Court, dated June 23, 1982, whereby it was stated, by Justice Liacos, speaking for that Court;

"It is ORDERED and ADJUDGED that the sentences are to be vacated and the defendants are to be resentenced in a manner consistent with the opinion."

The matter is before me, Mr. Kirby, for resentencing. First, I will hear you on disposition of this case as to what your recommendation is and the reasons for it.

MR. HRONES. Your Honor, before we proceed

any further, could I be heard?

THE COURT. No, you may not.

Do you have motions to file?

MR. HRONES. Your Honor --

THE COURT. Do you have motions to file?

MR. HRONES. Yes.

THE COURT. All right. File your motion with the Clerk Magistrate, Mr. Barbadoro.

MR. PISCITELLI. Your Honor, I have motions.

THE COURT. All counsel may file motions. They will be docketed and you will be heard, but not at this point.

MR. HRONES. It is a preliminary motion.

THE COURT. I said not at this point.

I am well aware what has taken place in Federal Court. I am well aware Justice Keeton has turned you down. I am well aware the Circuit Court has turned you down. And I am well aware you now have a petition before a Justice of the United States Supreme Court; and I have an open line to the Attorney General's office; and if any order is entered by a Justice of the United States Supreme Court, I will hear about it.

MR. HRONES. I just called the clerk's office, in Washington, and they are expecting a decision very soon. The Justice is now on the bench rendering decision. I wonder if you could give us half an hour.

THE COURT. Mr. Hrones, I am not going to dispose of the case at the present time. If I do dispose of the case, it will be at a much later time this morning. I have to hear your motions. I have to hear Mr. Kirby; and I have to give full consideration to a hearing before Judge Abrams, on October Fifth, and the plea that was taken at that time. I have already read the transcript, I might add; and I have read the Grand Jury Minutes; and I have to go over the probation file of these defendants. So whatever happens on this case is not going to happen until much later this morning.

MR. HRONES. Fine. Thank you, Your Honor. I just wanted the decision from the highest court before my client is actually sentenced.

THE COURT. Well, as I said, whatever happens on this case will not happen until much later this morning. I will assume, by that time, you will have some word from Washington as to whether

they wish to stay the proceedings.

MR. HRONES. Thanks.

THE COURT. So far, the Federal Courts have decided not to.

MR. HRONES. The courts here in Massachusetts; that is correct.

Thank you very much, Judge Donahue.

MR. MC CARTHY. I have a motion before the Court to withdraw as attorney for Mark Savoy.

THE COURT. Motion is denied, Counsel.

MR. PISCITELLI. Your Honor please, I have filed my appearance for Mr. Savoy. I have taken the case through the appellate process and my brother has not participated in the appellate process for the last several months. I am filing an appearance for Mr. Savoy. The Court should know I filed an appearance in Superior Court.

THE COURT. You filed what kind of motion?

MR. PISCITELLI. I filed my appearance, in Superior Court. I have represented Mr. Savoy in appellate process. I have not represented him in the original plea.

THE COURT. We will accept your appearance

MR. PISCITELLI. Thank you.

THE COURT. Do any other counsel have motions to file?

MS. HATTEM. Yes, Your Honor. I have a Motion For Continuance that has been given to the Clerk.

THE COURT. The Motion For Continuance is based on what?

MS. HATTEM. Based on the fact that I do not -- Massachusetts Defenders Committee represents Richard Dovel. Attorney Marie Buckley represented him at the original proceedings. She is no longer with our office. And as soon as it was learned that she would resign, the case was reassigned to Attorne Jeffrey Packard who, as stated in the motion, is on vacation. He received notice, on Friday, apparently this case would be heard today. Mr. Packard is currently sailing off the coast of Canada, I believe. He is certainly unavailable to the Court. I have met Mr. Dovel for the first time this morning. I have only a general familiarity with the case. Mr. Kirby was notified, or spoke with Mr. Packard shortl after the notice was given he was to be here today.

I don't believe, Your Honor, given the long and rather complicated history of this case,

that any prejudice would result by continuing for two to three weeks. Mr. Packard will be back on the Tenth of July. He's expected to begin a specially assigned case before Judge Young.

THE COURT. Miss Hattem, your motion is denied.

MS. HATTEM. Thank you, Your Honor.

MR. MC CARTHY. If I may?

THE COURT. Counsel, your Motion to Withdraw is denied. Please return to counsel table.

Other motions I will hear in due course.

MR. PISCITELLI. May I respectfully inquire of the Court? I am not quite sure under wha Your Honor just said, as to whether this is in resentencing, Rule 29, or just what it is. May I respectfully inquire of the Court?

THE COURT. I think the Order from the Supreme Judicial Court is quite clear. It is quit clear the case is here for sentencing. It is just as if the judge had retired, and taken a plea of guilty before his retirement; and the judge in th First Session was assigned to sentence the defend It is no different from that.

MR. PISCITELLI. Under the case which w

up, the decision of the S.J.C., it seems to indicate there was a motion made by the judge, himself, sua sponte motion, under Rule 29. Now I understand that Justice Abrams has recused himself, which means the judge who initiated the Rule 29 proceeding is no longer here to do that. So I must inquire, respectfully, now, are we acting under what Justice Abrams had done under Rule 29? Is Your Honor now sua sponte acting under Rule 29?

THE COURT. The decision that was rendered by the Supreme Judicial Court, in effect, rendered the October Ninth hearing a nullity.

MR. PISCITELLI. I don't think the Court said that.

THE COURT. That is my interpretation. The Order before me from the Supreme Judicial Court is that the defendants are to be resentenced; and I intend to proceed to do so. But I am going to hear all motions, in due time; and I will hear any motion you have, Mr. Piscitelli.

MR. PISCITELLI. Yes, Your Honor. I filed. May I inquire? Please forgive me if I appear to belabor this. I must understand,if Your Honor can tell --

THE COURT. I was going to proceed under Rule 12, as if a plea were taken and the defendants are to be sentenced.

MR. PISCITELLI. Twelve (a) or (b) you are proceeding under, now.

THE COURT. I think that the transcript of October Fifth is quite clear as to how Judge Abrams took the plea.

MR. PISCITELLI. The transcript, if you read it, is actually erroneous. I think he misstated the one in which he went. I think he stated it was under 12 (b).

THE COURT. In the transcript, Mr.Piscitel Justice Abrams told each and every one of the defendants what the maximum sentence was for each charge to which they were pleading guilty. The circumstances of the crime were laid out by Mr. Kirby, representing the District Attorney's office.

MR. PISCITELLI. Yes, Your Honor.

THE COURT. Each defendant admitted being involved, as described by Mr. Kirby.

Each counsel was inquired of by Justice Abrams as to whether they had informed their client of the necessary elements of the crimes to which

they were pleading guilty. Each attorney answered, "yes."

MR. PISCITELLI. Yes, Your Honor.

THE COURT. And the constitutional questions were asked, at that time, as to whether the defendants desired a trial.

MR. PISCITELLI. Yes, Your Honor; that is correct.

THE COURT. The Sixth Amendment rights, and self-incriminationrights. So I don't think it makes any difference how the plea was taken, under 12 (a) or 12 (b).

MR. PISCITELLI. I think -- excuse me.

THE COURT. I am not going to hear further argument, at this point. You may argue later, Mr. Piscitelli.

MR. PISCITELLI. All right. I will reserve my rights. I think I will point out to the Court, there was an erroneous assumption made; and it's on the record, on the October Ninth disposition.

THE COURT. The October Ninth disposition was a nullity, because Justice Liacos said there was improper notice given. The defendants were not given a proper hearing. They were not allowed to

argue; therefore the hearing is a nullity.

MR. PISCITELLI. If that is the case, the Court also said the sentence previously imposed was valid, which leaves us with valid sentence.

THE COURT. That is not what the Order from the Supreme Judicial Court says. It says the defendant is to be resentenced.

MR. PISCITELLI. Yes, Your Honor, but --

THE COURT. I am not going to hear argument further. Please go back to the table. You may argue your motions at a later time.

MR. PISCITELLI. All right, Your Honor. I will do that. Thank you.

THE COURT. At this point, Mr. Kirby, you may wish to argue later, when I hear the motions of the defendants; at this time I would like to hear your recommendation and the reasons for it.

MR. KIRBY. Yes, sir.

May it please the Court, it is my understanding, from what the Court said, that it has read the facts, the transcript of October Fifth proceedings, and all of the facts that I have related at that time.

At that time, as the record shows, I

recommended that each of the defendants be committed to M.C.I. Concord for a period of ten years. I renew my recommendation of that time. It is my belief, Your Honor, under the current law, and in case law, particularly, that I am bound, technically and professionally, to that recommendation at that time. I find no change in the circumstances (other than circumstances relating to the facts of the case,) since that time; and I renew my recommendation of October Fifth that each of the defendants be committed to M.C.I. Concord for the ten years.

THE COURT. Thank you, Mr. Kirby.

Mr. Hrones, you represent which defendant?

MR. HRONES. I represent Alexander Aldoupolis.

THE COURT. And you have filed how many motions? Motion to Stay the Sentence.

MR. HRONES. Motion to Stay The Sentencing I also have a couple of other motions, but I would like a clarification prior to filing. I agree with Your Honor that the proceedings on October Ninth were a nullity. However, the Supreme Judicial Court ruled the sentence on October Fifth was a legal sentence. So my interpretation, certainly, of the

remand order was that it was remanded for the reimposition of the valid sentence on Monday, October Fifth. However, the Court said that a judge, in the interest of justice, if he wanted to --

THE COURT. Wait a minute, Mr. Hrones. What motion are you now arguing? The only motion I see before me is a Motion to Stay The Resentencing. I want you, if you are going to argue a motion, I want to see something in writing.

MR. HRONES. I have the motion, Your Honor, but I just wanted to clarify what we are here for, today, before I file the motion. I think that is very important. I just want to get on the record, before I file the motion, so I don't waive any rights.

THE COURT. The defendants are here, I think I made clear, for sentencing, Mr. Hrones.

MR. HRONES. Yes, Your Honor, but it's my position the Supreme Court decision, from our own State Supreme Court, requires either that you reimpose the original sentence that they said is valid, or you proceed according to Rule 29; and if you are proceeding according to Rule 29, then you can render a different sentence. Of course, we

object to —

THE COURT. No, sir. I do not agree wit you. I re-read the decision. I had a law clerk work on it for a week. I do not agree to any proposition you state. The defendants are here to be resentenced in accordance with the chapters and sections of the General Laws under which they plead guilty.

MR. HRONES. So let me put on the record so it's absolutely clear, that the Defendant Aldoupolis, number one, objects to this resentencin It is his position that it violates his rights, und the United States Constitution, not to be put in double jeopardy, because the Supreme Judicial Court of this State declared the original sentence he gav on Monday, October Fifth, was a legal one. I want it absolutely clear, any motions filed today are no waiving that point. That the only reason these motions are being filed is because the defendant mu file them in order to protect his double jeopardy rights.

THE COURT. I have asked you, three time what motions do you wish to file?

MR. HRONES. Thus, I will file, now, a

Motion to Withdraw a Guilty Plea, and an affidavit in support of that motion.

THE COURT. May I see them.

MR. HRONES. And I file it based on the statement of Your Honor that you are not proceeding under Rule 29; that you are proceeding to resentence. And that apparently it's your position that you aren't bound to give the suspended sentence of Monday, but that you are in a position, now, in resentencing, to sentence these defendants to any time up until the maximum punishment authorized? Is that your position, Your Honor?

THE COURT. Yes.

MR. HRONES. Okay.

Accordingly, I now file a Motion to Withdraw a Guilty Plea, and an affidavit in support thereof.

THE COURT. May I see the motions. I have asked that, three times.

MR. HRONES. Yes, Your Honor.

MR. KIRBY. I have not had an opportunity to see these.

THE COURT. I understand.

[Motions filed with the Court.]

THE COURT. Your Motion to Withdraw, Mr. Hrones, is based on your allegation of what took place in Judge Abrams' lobby. I must inform you that I am only concerned with what the record indicates which took place in open court, on October Fifth of 1981, when Judge Abrams took these pleas, and questioned the defendants.

MR. HRONES. But certainly, what went on, in chambers, where the judge goes to the voluntariness --

THE COURT. I deny your motion without prejudice.

MR. HRONES. -- of those pleas.

THE COURT. I deny your motion and save your objection.

MR. HRONES. One more thing, I want to make it absolutely clear --

THE COURT. Gentlemen, I am going to take a short recess. Apparently there is a call from the Clerk of the United States Supreme Court which may be in relation to this particular case. So I had better make some determination as to what is going on down there before we proceed further, here.

RECESS

[After recess.]

THE COURT. The record will note that this Court has received a call from Robert Kuhn, who is Clerk to Justice William Brennan of the United States Supreme Court, informing this Court that Justice Brennan has entered an interlocutory order, staying the Order of the Supreme Judicial Court, which I had read, earlier, in the record, which had ordered me, or the judge in the First Criminal Session, to resentence these defendants.

The interlocutory decree, for the benefit of those who are not familiar with this proceeding, is pending a receipt of a response to the application for a stay; and the response will be considered on July Eighth of 1982, which is next week. This does not mean that the United States Supreme Court has stayed these proceedings, as a final matter; but it means that they have entered an interlocutory decree, or Justice Brennan did, to consider any response of the Attorney General of the Commonwealth.

So, consequently, what I am going to do, in accordance with the interlocutory decree, is I am going to continue this matter for disposition,

at the suggestion of Judge Brennan's Clerk, to July 15, 1982. The matter will still be on the list for disposition, because if Justice Brennan reads the briefs, and hears the arguments of Counsel, he may well follow what Justice Keeton, of the Federal District Court, and Circuit Court did; and deny the motion for a stay. On the other hand, he may allow the motion for a stay so that the Full Court can hear this matter. But, in anticipation that the matter will have to be further considered by this Court, I am continuing this matter to July 15, 1982. All Counsel are to be present, at that time; and all defendants are to be present, at that time.

Court will stand in recess.

[Court recessed.]

CERTIFICATE

This is to certify that the foregoing is a true and correct transcript of my Stenotype Notes, taken by me, at Norfolk County Superior Court, in the First Criminal Session, at Dedham, Massachusetts, Before: DONAHUE, J., on Thursday, July 1, 1982, at a Hearing on Resentencing, in the matter of Norfolk Nos. 76300-76322, Commonwealth vs. Robert J. Tarr, Et Al.

Catherine McEllin

Catherine McEllin
Official Court Reporter
Massachusetts Superior Court

Supreme Court of the United States

No. A-1140

ALEXANDER ALDOUPOLIS,

Petitioner

v.

MASSACHUSETTS

ORDER

UPON CONSIDERATION of the application of counsel for the petitioner,

IT IS ORDERED that the re-sentencing proceedings scheduled for July 1, 1982 in the above-entitled case be, and the same are hereby, stayed pending receipt of a response and further order of the undersigned or of the Court.

/s/ William J. Brennan, Jr.
Associate Justice of the Supreme Court of the United States

Dated this First
day of July, 1982.

A true copy ALEXANDER L. STEVAS
Clerk
Clerk of the Supreme Court of the United States
By Frances J. Carlson
Chief Deputy

APPENDIX K

Supreme Court of the United States

No. A-1140

ALEXANDER ALDOUPOLIS,

Petitioner

v.

MASSACHUSETTS

ORDER

UPON FURTHER CONSIDERATION of the application of counsel for the petitioner and the response filed in opposition thereto,

IT IS ORDERED that the order heretofore entered by the undersigned on July 1, 1982 be, and the same is hereby, vacated and the application for stay is denied without prejudice to reapplication after final disposition of the proceedings before the Superior Court of Massachusetts for Norfolk County.

/s/ William J. Brennan, Jr.
Associate Justice of the Supreme Court of the United States

Dated this 6th day of July, 1982.

A true copy [illegible]
Clerk of the Supreme Court of the United States
By [illegible]
Chief Deputy

Probation in Rape Case Revoked After Outcry

5 Pleaded Guilty in Judge-Supervised Agreement; Jurists Assail 'Sentencing by Public Opinion'

By BARRY SIEGEL, *Times Staff Writer*

DEDHAM, Mass.—The news out of the Norfolk County courthouse on Oct. 5 was destined to provoke a public outcry.

Superior Judge Herbert Abrams, after listening to five young men plead guilty to gang-raping a 38-year-old woman, had put the defendants on two years' probation, suspended three- to five-year sentences to Walpole state prison and fined them each $500 in court costs, to be paid at the rate of $5 a week. They would serve no time behind bars.

The reaction quickly snowballed.

Local newspaper headlines proclaimed "5 Rapists Freed" and "License to Rape." Radio stations, Abrams, the prosecutor and Massachusetts Gov. Edward J. King—who appointed the judge to the bench in 1979—received hundreds of enraged phone calls attacking the sentence.

Governor Angered

State legislators introduced resolutions and issued public statements of denunciation. The chief judge of the Superior Court and a state judicial commission were asked to investigate the case and the judge. Gov. King held an angry press conference and went on radio talk shows.

Judge Abrams endured just four days of this pressure.

Then, on Oct. 9, he summoned everyone involved in the case back to his courtroom. Without a motion from either side or a hearing, he revoked the suspended sentences. The five young men, he ruled, would have to serve the three- to five-year Walpole sentences, unless they chose to switch their pleas to not guilty and stand trial.

In this fashion, Abrams managed to elevate the relatively narrow question of whether the sentences were too lenient to the wider issue of whether a judge under any circumstances ought to revise the sentence he has imposed.

Lawyers and judges here, speaking of the Abrams matter, express dismay at the extent to which public pressure and outcry seem to affect judges' decisions. They talk of "defensive judging" and "sentencing by public opinion." They suggest that Abrams' action was simply a more obvious and visible form of something that usually happens more subtly.

Judge Badly Beaten

Citizens who know little about the legal system, courtroom procedures or the specifics of a case are protesting judges' decisions with increasing frequency and intensity.

In the Boston area alone in recent months, four other judges besides Abrams have stirred public fury in cases involving rape, assault and murder. In Honolulu, a state judge who overturned a jury's murder verdict provoked a 300-person demonstration and was beaten so badly by an assailant that he required emergency brain surgery.

When asked if such pressure affects judges' decisions, Superior Judge Robert Hallisey, head of a Massachusetts bench-bar-news committee, said, "Do you think the accuracy of a quarterback's passes is affected by the knowledge that a 300-pound brute is about to hit him?"

'A Vigilante Feeling'

Even the prosecutor in the Dedham rape case later expressed unhappiness.

"There is a vigilante feeling that is affecting prosecutors and judges," Norfolk County Assistant Dist. Atty. Gerald Kirby said. "We cannot allow our judicial system to be run by pressure of the press and various interest groups. But that is what is happening. Before a decision is made, a lot of people are considering how it will affect outside opinion and interest groups."

The rape case Abrams presided over yields several insights into the collision between the outside pressures and specific legal questions that judges must grapple with. It illustrates also the manner in which

Please see RAPE, Page 22

The Betamax Imbroglio

For television addicts, video-cassette recorders guarantee that except in a blackout, nothing can stand between them and their favorite programs. But to producers the VCR is a mechanical alchemist that can turn their expensive programs into cheap knock-offs to be played back at will. These conflicting appraisals came to judgment last week when a Federal appeals court in San Francisco ruled that taping a television show violates a producer's copyright—an unexpected decision that makes lawbreakers of people who didn't know they were stealing when they switched on their sets.

The ruling not only raised the question of whether copyright laws are keeping up with modern communications technology; on a more practical level, it threw the whole Betamax business into confusion. "Retailers don't know whether they can continue to sell them," said Bruce Lehman, chief counsel to a Congressional subcommittee that handles copyright law, "and a lot of congressmen think their constituents are going to be sued." The ruling, which is certain to be appealed, might conceivably lead to a ban on the sale of the chic consumer toys. A more practical solution seemed to be a licensing system that would require the video-recorder companies to pay substantial fees to moviemakers and networks.

No Harm: The case began in 1976, a year after Sony introduced its Betamax. Sony's pitch to consumers was not very sensitive to copyright problems: for $2,295, a viewer would never again have to worry about missing a program while sleeping, out of the house or watching another channel. Movie and television studios screamed in protest. They argued that their productions were protected by Federal law and predicted that investments would become worthless as home libraries grew. With no compromise in sight, Universal and Walt Disney studios sued Sony and several retailers, charging copyright abuse.

Two years ago a Federal judge in Los Angeles sided with Sony, holding that the filmmakers had not demonstrated any harm and that home taping fell within the "fair use" exception to the copyright laws (fair use permits limited copying for educational or research purposes). Last week the appeals court reversed. It said that the companies that manufacture and distribute video recorders, the ad agencies that promote them and the consumers who use them are liable for damages. The three-judge decision, which applies only to nine Western states, turned on two contested points. First, the judges said that a 1971 amendment to the 1909 copyright statute did not authorize videotaping for home use—although it did permit private persons to record radio broadcasts. Second, the court held that taping an entire show did not amount to fair use. With a Betamax, the court said, it is "clear that taping tends to diminish the potential market for the [studio's] work."

While Sony vowed to carry the case to the U.S. Supreme Court, the appeals judges sent the matter back down to the trial court with instructions to devise an appropriate remedy. No one believes that any penalties will be levied directly against machine users. "It would be like Prohibition," said Charles Firestone, professor of communications law at UCLA. "The middle class would be breaking the laws in their own homes." Instead, the most plausible outcome is a system suggested by the dean of copyright scholars, UCLA's Melville Nimmer: manufacturers would pay a percentage of their gross sales into a central pot that would then be divided among show producers. The fees would be passed along to consumers.

For legal scholars, a more important issue is whether the copyright laws now on the books can reasonably be applied to the technology of the late twentieth century. The Congressional revisions of 1978 acknowledged the advent of cable television, but as Nimmer says, "There is still tension between the developments of technology and the status of copyright law. The law is behind." Nimmer also thought last week's decision reopens the issues of *Williams & Wilkins v. the United States*, the 1973 case that permitted documents to be photocopied under the fair-use statute. Maintains Nimmer: "The court now says that photocopying is wrong."

ARIC PRESS with JANET HUCK in Los Angeles, PEGGY CLAUSEN in New York and bureau reports

Defendants in court: Was the judge too lenient—or too pliant?

Sentencing by Public Outcry?

The Boston Globe denounced it as a "license to rape," and everyone from ardent feminists to Gov. Edward J. King condemned the injustice: five young men had pleaded guilty to gang rape, and instead of sending them to jail, Massachusetts Superior Court Judge Herbert Abrams merely put them on probation for two years and fined them $500 each, payable at $5 a week. Four days later Abrams announced that he would reconsider the sentence. His reversal unleashed a new round of criticism that Abrams had bowed to political pressure.

The facts of the case were as ambiguous as its legal implications. The prosecution held that in January 1980, a 38-year-old former beauty queen was abducted from a Holbrook, Mass., bar by the men, who raped her in a nearby woods, then abandoned her naked in the icy outdoors. Even though defense attorney Stephen Hrones acknowledged that "things that night definitely got out of hand," the defendants said the woman, an alcoholic on the mend, voluntarily left the bar with them, promising her favors for $200.

Judge Abrams said he offered leniency because the defendants were all "first offenders from . . . supportive families." The case has now gone to the state's Supreme Judicial Court, where Justice Neil Lynch will decide this week whether to send it back to the lower court, pass judgment on the merits of Abrams's actions himself or hold a review in the high court. Should he find that a retrial does not constitute double jeopardy, defense attorneys are marshaling new reasons to keep the men out of prison: they will contend that the media outcry has endangered their clients' chances of a fair trial.

Boston Herald American

WEATHER
TODAY
Partly cloudy, cool
Highs 50 to 55
TOMORROW
Partly cloudy, cool
Highs 50 to 55
Details: Page 34

Telephone (617) 426-3000 ★★★ 25 Cents ® Thursday, October 8, 1

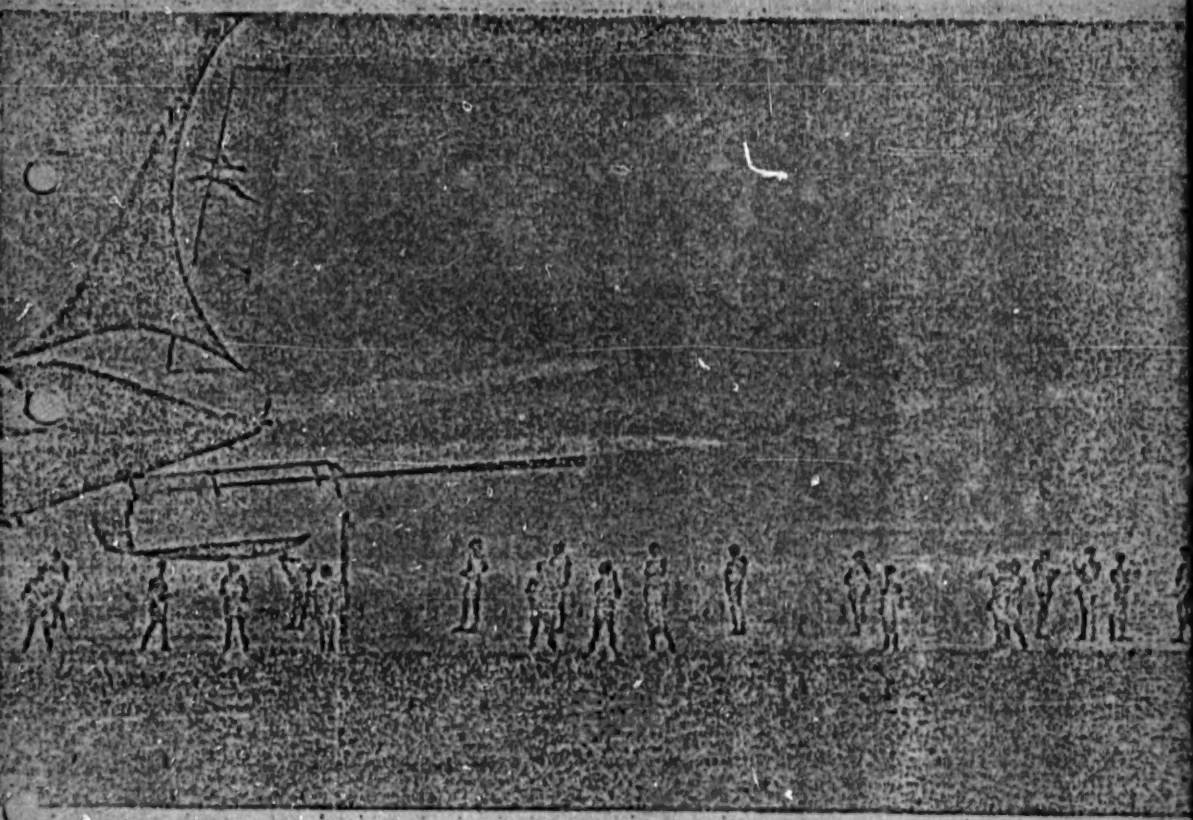
APPENDIX L

FIVE RAPISTS FREED, BUT WAS IT LEGAL?

Page

Los Angeles Times

90,194 Sunday | Friday, November 27, 1981 | CCI/188 pages/Cop



South African troops surround Air India jet at Durban airport just before hijackers gave themselves up and passengers and crew were re

Probation in Rape Case Revoked After Outcry

5 Pleaded Guilty in Judge-Supervised Agreement; Jurists Assail 'Sentencing by Public Opinion'

By BARRY SIEGEL, *Times Staff Writer*

DEDHAM, Mass.—The news out of the Norfolk County courthouse on Oct. 5 was destined to provoke a question of whether the sentences were too lenient to the wider issue

Begin Has Surgery on Thigh Broken in Fall at Home

From Times Wire Services

JERUSALEM—Prime Minister Menachem Begin underwent two hours of emergency surgery Thursday night for a broken bone in his left thigh, Hadassah Hospital announced.

22 Ships Boarded

Pirates Pla Supertanke Off Singapo

By KEYES BEECH, *Times Staff Writer*

jail terms

Judge Herbert Abrams AP Photo

Revokes suspended sentences he had given five admitted rapists.

Reversal raises legal questions

By JAMES CONNOLLY

The about-face by Judge Herbert Abrams yesterday left the legal status of five admitted rapists muddled, with the key unanswered question being, "Can he do that?"

A consensus of attorneys interviewed by the Herald American was that a judge has up to 60 days after sentencing to change his mind, either to the advantage or disadvantage of a defendant, "if it appears that justice may not have been done."

That provision is contained in Rule 29 of the Massachusetts Rules of Criminal Procedures, although it is rarely invoked without a request by the defendant.

But the way Abrams handled his reversal, in the wake of a public outcry and with his offer for the five to withdraw their guilty pleas, raises questions that apparently must be answered by appeals courts.

"A judge has no right to coerce a plea from a defendant. It is very apparent here that if there is a change of plea and the men go to trial, there is a good, solid chance of it being double jeopardy," charged former Superior Court Chief Justice Walter H. McLaughlin.

He said the five men should have received prison sentences originally. The "coercion" could be the judge's threat of a prison sentence unless the men plead not guilty.

Double jeopardy — improperly being charged with the same offense twice — would result in an appeals court dismissing the rape charges against the men, said Harvard Law School Professor Alan M. Dershowitz. But that is only one of the questions, he said.

"I think Governor King's interference in an ongoing criminal case is indefensible. Judge Abrams' decision to reverse himself without even a motion from the district attorney creates the impression that he was coerced."

Reversal of rape sen

Experts astounded by judge's reversal

Patriot Ledger Staff

DEDHAM — Judge Herbert Abrams' surprise decision to revoke the suspended prison sentences of five rape defendants drew strong criticism yesterday from legal scholars and court experts.

Walter McLaughlin, a former chief justice of the state's superior court system, said he was "simply amazed" and questioned the legality of the judge's action.

"He's gone from the frying pan into the fire. A judge does have the right to revoke a sentence, but he has revoked the sentences in this case to try to compel them to change their plea to not guilty and to go to trial on the merits," McLaughlin said.

"A judge has no power to compel a plea of not guilty. If the judge thought they were not guilty, he should never have accepted a guilty plea in the first place."

McLaughlin said Abrams, in effect, "coerced" the defendants by first negotiating an agreement for them to admit guilt and forego a trial, then changing his mind and putting them in a legal bind.

"He has violated every right that a defendant has under our judicial system," McLaughlin said. "It just can't be done."

Asked what options Abrams had, McLaughlin said: "Simply apologize."

McLaughlin, now a Boston attorney, retired as the Superior court chief justice in January 1977. Three years earlier, in May 1974, he had angrily denounced a jury for acquitting a Boston man accused of raping a 22-year-old secretary. "Rape is going to continue until jurors, by their verdicts, convict and punish when the evidence is overwhelming," McLaughlin said then.

Harvard Law Professor Alan Dershowitz, considered a national expert on criminal law, criticized Abrams for changing his mind because of public outrage over his handling of the case.

"The judge has created the appearance around the commonwealth that he's going to sway with the wind,"

(Please see REACTION — Page 12)

Four of the five defendants in the Holbrook rape trial listen intently in Norfolk Superior Court. From left: Robert J. Torr, Richard Duval, Alexander Aldoupolis and John Strickland. Not in the photo, although present in the courtroom, is the fifth defendant, Mark Savoy. At right, Judge Herbert Abrams reverses his previous decision to suspend sentences against the five.

The Boston Globe
THURSDAY, JULY 15, 1982

Judge orders 2d rape trial for 5 men in Holbrook case

By Maggie Rivas
Globe Staff

Five men whose original suspended sentences in a rape case provoked public outcry and a protest from Gov. Edward J. King will receive a new trial in Norfolk Superior Court.

Judge Roger Donahue ordered the new trial at a hearing this morning in Dedham and scheduled it to begin Dec. 2.

Donahue had been expected to consider the prosecution's original request for a sentence of 10 years in the Massachusetts Correctional Institute at Concord.

The defendants, Alexander Aldoupolis, 21, of Quincy; and Mark S. Savoy, 21, Robert J. Tarr, 21, John Strickland, 21, and Richard Duval, 20, all of Holbrook, pleaded guilty to the January 1980 rape of a Whitman woman in Holbrook.

Attorneys for the defendants said their clients had pleaded guilty because they understood they would be given light sentences.

The five defendants, their faces showing no emotion, stood up one at a time as Donahue announced his decision to each of them individually. Afterwards, none of them would talk to reporters who attended the hearing.

Margaret Savoy, mother of one of the defendants, said she believed her son would receive a fair trial.

"They did wrong," she said. But, she added, their account of the night in which the woman allegedly was raped has not been told.

Although other parents would not comment, the mother of Robert Tarr, beamed as she stood outside the courtroom. Asked if she was pleased with the outcome, she smiled and nodded, but would not speak.

The case received much attention last October after Superior Court Judge Herbert Abrams gave the men suspended sentences of three to five years and ordered them to pay $500 in court costs by $5 weekly installments.

News of the sentencing led to a major public controversy, including a condemnation from the governor, and Abrams reversed himself four days later. On Oct. 9 he revoked the suspended sentences and

RAPE CASE, Page 33

Brennan Stays Resentencing in Rape

By FOX BUTTERFIELD
Special to The New York Times

BOSTON, July 1 — At the last minute, a Justice of the United States Supreme Court intervened today to stay the resentencing of five young men who were given suspended sentences after pleading guilty to rape last fall.

Justice William J. Brennan Jr. issued the stay in a telephone call to Judge Roger Donahue of Norfolk Superior Court, who had taken over the case at the suggestion of the State Supreme Court.

The defendants had argued that they were being subjected to unconstitutional double jeopardy.

The case created a major controversy in Massachusetts after Judge Herbert Abrams, who presided over their trial, freed them last October after imposing suspended sentences and $500 in court costs, to be paid at the rate of $5 a week. The five men had pleaded guilty to raping a 38-year-old woman, a former Miss Ohio, in suburban Holbrook.

Sentences Reversed After Outcry

After an outcry by the press and the public and criticism by Gov. Edward J. King, Judge Abrams reversed himself four days later and ordered the men to serve jail terms of three to five years. That raised new questions about the arbitrariness of justice and the extent to which public opinion influences judges' decisions.

Lawyers for the defendants appealed to the State Supreme Court, which ruled in May that Judge Abrams had the power to increase the original sentences but that he should have given the defendants a chance to be heard first.

The state court then sent the case back for resentencing and suggested it be heard by another judge.

Stephen Hrones, a lawyer for one of the five defendants, said that Judge Donahue was about to resentence the men this morning just before the call came from Justice Brennan.

'Saved at the Bell'

"It was wild, like something out of the movies," Mr. Hrones said. "We were in open court when we heard the telephone ring in the judge's chambers and a bailiff came out and whispered in the judge's ear. We were saved at the bell by the court of last appeal."

Mr. Hrones was turned down Wednesday in an appeal to the Federal District Court in Boston, then went to the Supreme Court.

In this morning's court action, Mr. Hrones said, he and the other defense attorneys first asked Judge Donahue to allow a full rehearing, which was denied. They then asked the judge simply to reimpose the original suspended sentences, but he indicated that he intended to mete out stiffer punishment.

Under Justice Brennan's order, the State Attorney General has until July 8 to file a response to Mr. Hrones's appeal. The Supreme Court can then decide whether to continue the stay and what action to take on the appeal.

Defense Lawyer Pleased by Order

Mr. Hrones said he was pleased with Justice Brennan's order, which he said "indicates he believes the issue we raised about double jeopardy is substantial."

He noted that it was unusual for the Supreme Court to intervene in a state criminal proceeding.

The case began Jan. 23, 1980, when seven young men picked up the woman in a Holbrook bar and drove in her car to a wooded area. The defendants have contended that the woman, who had a history of alcoholism, was intoxicated and agreed to go with them.

She was later found wandering alone, bruised and bleeding and crying for help. Her car had been rolled over an embankment and extensively damaged.

In the original trial, the Government's case rested entirely on the testimony of Christian Dixon, a 21-year-old participant in the attack who had later gone back to help the woman and had taken her to a fire station. The woman was under psychiatric care and could not testify.

Plea Bargain Not Reported

According to lawyers in the case, the five defendants agreed to plead guilty only after a conference with Judge Abrams in which he offered to give them suspended sentences in exchange. The defense considered the Government's case weak, particularly because the prosecution's witness had testified before a grand jury that the woman had said she would have relations with all seven men for $200.

When the suspended sentences were reported the next day, this plea bargaining and the reasons behind it were not made public.

But Governor King, a conservative Democrat who had run on a platform of being tough on criminals and who had appointed Judge Abrams, called a news conference to denounce the light sentence.

When Judge Abrams then appeared to bow to public pressure and called the five men back into court, he ruled that they would have to go to jail unless they chose to switch their pleas to not guilty and to stand trial. If they changed their pleas, they would face the problem of trying to find a jury that did not know they had once admitted their guilt.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

NO. 82 5159

ALEXANDER ALDOUPOLIS,

Petitioner,

v.

COMMONWEALTH OF MASSACHUSETTS,

Respondent.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Now comes the Petitioner, Alexander Aldoupolis, and respectfully requests this Honorable Court to allow him to proceed in Forma Pauperis. Since Petitioner is unable to pay the necessary fees and costs or give security therefor, the statutory requirements of 28 U.S.C. §1915 are satisfied. Because of Petitioner's poverty counsel was appointed by the state superior court below.

By his attorney,

Stephen Hrones
190 High Street
Boston, MA 02110
(617) 451-5151

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

NO. _____

ALEXANDER ALDOUPOLIS,

Petitioner,

v.

COMMONWEALTH OF
MASSACHUSETTS,

Respondent.

AFFIDAVIT IN SUPPORT OF MOTION TO PROCEED
IN FORMA PAUPERIS

I, Alexander Aldoupolis, being first duly sworn, depose and say that I am the Petitioner, in the above-entitled case; that in support of my motion to proceed without being required to pre-pay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to redress;

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of a petition for a writ of certiorari are true.

1. Are you presently employed?

   Yes. Delmed Inc., 1515 Washington Street, Braintree, Massachusetts. Net Wages: $680 per month.

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source?

   No.

3. Do you own any cash or checking or savings

account?

No.

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)?

'73 Pontiac LeMans value: $300.

5. List the persons who are dependent upon you for support and state your relationship to those persons.

Sharon Aldoupolis: Wife

Stephen James Aldoupolis: Son

6. I owe the following debts:

Quincy City Hospital	$2,000.00
Quincy Court	1,000.00
Parents	2,600.00
Quincy Savings Bank	1,000.00

I understand that a false statement or answer to any question in this affidavit will subject me to penalties for perjury.

Alexander P. Aldoupolis
Alexander Aldoupolis

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS July 28, 1982

Then personally appeared the within-named Alexander Aldoupolis and acknowledged that he signed the foregoing instrument of his free act and deed for the purposes therein set forth, Before me,

Stephen Hrones
Stephen Hrones
My Commission Expires: 12/5/86

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

NO. 82 5159

ALEXANDER ALDOUPOLIS,

Petitioner,

V.

COMMONWEALTH OF MASSACHUSETTS,

Respondent.

AFFIDAVIT OF PETITIONER'S COUNSEL

Now comes Counsel for the Petitioner and states as follows:

On July 15, 1982 Judge Donahue reconsidered his denial of Petitioner's Motion to Withdraw Guilty Plea that had been filed on July 1, 1982 and allowed the motion. Once again on July 15 I made it absolutely clear that it was Petitioner's position that he had the constitutional right to the suspended sentence originally given on October 5,1981. The judge once again indicated that he did not feel bound by the decision of the Supreme Judicial Court to re-impose the suspended sentence. I stressed to the Court that the allowance of the Motion to Withdraw Guilty Plea would be preferable to the incarceration of Petitioner but that the Motion to Withdraw Guilty Plea in no event should be interpreted as a waiver of Petitioner's constitutional right not to be put in double jeopardy and that it was filed as the only remaining course available to prevent the placing of Petitioner in double jeopardy.

The judge allowed the Motion to Withdraw Guilty Plea on July 15 stating that he believed the re-sentencing on October 9, 1981,where another superior court judge reversed himself and increased the original suspended sentences of October 5, 1981, offended "all sense of fairness. Our system of justice is a system fair to everybody."

Signed and sworn to under the pains and penalties of perjury this 30 th day of July, 1982.

Stephen Hrones

Stephen Hrones
190 High Street
Boston, MA. 02110
(617) 451-5151